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No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHEMICAL MANUFACTURERS ASSOCIATION,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

The decision below raises important questions concerning the implementation of pretreatment standards under Section 307(b) of the Clean Water Act. Under this program, EPA has established technology-based standards for industrial wastewater discharges to publicly owned treatment works (POTWs). However, in order to avoid wasteful expenditures for redundant treatment, Congress provided in Section 307(b) that these standards may be adjusted to reflect the removal of pollutants by POTWs receiving industrial wastes. The court below struck down EPA's so-called "removal credit" regulations, on the grounds that EPA has not established sufficiently comprehensive guidelines for municipal sludge use or disposal under Section 405 of the Act. The questions presented are:

1. Whether the decision of the Third Circuit improperly upset EPA's reasonable and longstanding construction of the Act, thereby disrupting a key aspect of the control of water pollution.

2. Whether the decision below conflicts with decisions of this Court and other circuit courts in ruling upon the adequacy of regulations not reviewable in the courts of appeals.

3. Whether the decision below is contrary to the unambiguous language of the Act and the intent of Congress.

PARTIES

The parties to this action are as follows:

Chemical Manufacturers Association (CMA);

Chicago Association of Commerce and Industry (CACI), Illinois Manufacturers' Association and Mid-America Legal Foundation;

U.S. Environmental Protection Agency (EPA); and

Natural Resources Defense Council, Inc. (NRDC).

NRDC was the petitioner below, and EPA was the respondent. CMA and CACI, *et al.* were intervenor-respondents below.

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NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Chemical Manufacturers Association prays that a writ of *certiorari* issue to review the opinion and judgment of the United States Court of Appeals for the Third Circuit in this case.[1]

OPINION BELOW

The opinion of the court of appeals is reported at ___ F.2d ___, and is reprinted in the Appendix to this petition at A-1.

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[1] This petition was filed on an expedited basis. The Court may wish to defer acting on this petition until the United States and CACI file petitions for a writ of *certiorari*, or the time for seeking *certiorari* has expired, so that the Court will have before it all relevant matters.

JURISDICTION

The decision below was rendered on April 30, 1986. A timely request for a rehearing was denied by the Third Circuit on July 11, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTES AND REGULATIONS INVOLVED

This case involves pretreatment standards for industrial dischargers established under Section 307(b) of the Clean Water Act, 33 U.S.C. § 1317(b) (1982). Section 405 of the Clean Water Act contains provisions relating to the disposal or use of sewage sludge resulting from the operation of municipal treatment works. 33 U.S.C. § 1345 (1982). Sections 307(b) and 405 of the Act are set forth in the Appendix at A-55 and in n. 18 below.

EPA's regulations governing the issuance of removal credits for pretreatment standards are codified at 40 C.F.R. § 403.7 (1985), and are set forth in the Appendix A-57.

STATEMENT OF THE CASE

Under the Clean Water Act, EPA is directed to promulgate technology-based effluent limitations guidelines and standards applicable to various major segments of American industry. Under Section 307(b) of the Act, EPA promulgates pretreatment standards for industrial wastewater discharges to publicly owned treatment works (POTWs). Pretreatment standards are established by EPA for various industrial categories to reflect "best available technology" levels of control. The standards are called "pretreatment"

standards because the wastewater that an industrial facility discharges will be treated twice—once by the facility prior to discharge to a city sewer, and once by a POTW prior to discharge to navigable waters. Recognizing that there would be duplicative treatment of wastewater discharged by industry to POTWs, Congress authorized POTWs to grant "removal credits" to industrial dischargers. The intent of Congress was to avoid needless expenditures by industry for redundant treatment.[2] Removal credits thus modify the pretreatment standards promulgated by EPA in order to take into account the removal of pollutants that individual POTWs achieve; such credits are an integral part of the pretreatment program.[3]

This petition seeks review of a judgment of the Third Circuit which struck down EPA's removal credit regulations on the ground that EPA does not have sufficiently comprehensive regulations governing the use or disposal of municipal sludge under Section 405 of the Act, 33 U.S.C. § 1345. The court's decision will have an enormous impact on the pretreatment

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[2] *A Legislative History of the Clean Water Act of 1977*, Cong. Research Service, No. 14, 95th Cong., 2d Sess. (Comm. Print 1978) at 343.

[3] To illustrate the effect of a removal credit, assume that a plant's wastewater contain 10 pounds per day of copper and that the pretreatment standard applicable to the plant allows the plant to discharge only 1 pound per day of copper. Also assume that the POTW to which the plant discharges its wastes is capable of removing 50 percent of the copper discharged to it, resulting in a 50 percent removal credit. Then the plant will be required to remove 8 (rather than 9) of the 10 pounds of copper from its wastewater; the POTW will remove half of the 2 pounds discharged to it, resulting in a discharge to navigable waters of 1 pound of copper.

program. Removal credits are reflected in federal and state permits, municipal ordinances and contracts between municipal agencies and industrial dischargers. Industrial dischargers have been taking action to come into compliance with pretreatment standards on the assumption that credits would be available. The court's decision, however, will mean that timely removal credits will be unavailable. As a result, industrial dischargers to POTWs will be required to spend large sums of money to design, install and operate redundant wastewater treatment.

The decision below upsets EPA's reasonable and longstanding construction of the Act. Moreover, the Third Circuit has struck down the removal credit regulations because of its views on the adequacy of a set of regulations concerning sludge use and disposal that were not properly reviewable in the courts of appeals.

A. Legislative And Administrative Background

A brief discussion of the Act's program of guidelines and standards provides the background of the proceedings below. Under the Clean Water Act, dischargers must comply with technology-based effluent limitations and standards. The statute regulates both direct discharges to waters of the United States, and indirect discharges to POTWs. Direct industrial dischargers must achieve limitations based upon the "best available technology economically achievable" (BAT) by July 1, 1984. 33 U.S.C. § 1311(b)(2)(A), (C) (1982). POTWs, which are also direct dischargers, are required by the Clean Water Act to meet discharge limitations based upon secondary treatment. 33 U.S.C. § 1311(b)(1)(B). Industrial dischargers to POTWs are required to

comply with pretreatment standards established under the Act for pollutants that are not susceptible to treatment by POTWs or would interfere with the operation of POTWs. 33 U.S.C. § 1317(b).

The federal government has provided billions of dollars for the construction of POTWs. Although most POTWs are designed to treat primarily domestic wastes,[4] POTWs also remove significant amounts of toxic pollutants contained in industrial wastewaters. Recognizing this fact, Congress sought to avoid wasteful expenditures for duplicative treatment of industrial wastes by POTWs and industrial dischargers to municipal sewers. Congress thus provided in Section 307(b) of the Act that POTWs may revise pretreatment standards applicable to industrial users to reflect the removal of toxic pollutants by the POTWs. *Id.*

To implement the pretreatment provisions of Section 307(b), EPA has promulgated a series of technology-based pretreatment standards for specific industrial categories, such as the inorganic chemicals manufacturing industry. These categorical standards are analogous to the "best available technology" regulations applicable to direct dischargers. *See* 40 C.F.R. Parts 400-469 (1985). EPA has also promulgated a set of general pretreatment regulations, codified in 40 C.F.R. Part 403 (1985), which contain provisions

[4] Congress intended to encourage joint treatment by POTWs of compatible industrial and municipal wastewater. As a result, pollutants that are compatible with a POTW are not subject to pretreatment standards. *See* 33 U.S.C. § 1317(b)(1) (1982); H.R. Rep. No. 911, 92d Cong., 2d Sess. 113 (1972), *reprinted in* Vol. 1, *A Legislative History of the Water Pollution Control Act Amendments of 1972*, Cong. Research Service, No. 1 (Comm. Print 1973) at 800.

for calculating, adjusting and implementing the categorical, technology-based pretreatment standards. These regulations include the "removal credit" provisions allowing for the revision of pretreatment standards to reflect the removal of pollutants by POTWs. 40 C.F.R. § 403.7 (1985). The general pretreatment regulations were first promulgated in 1978 (43 *Fed. Reg.* 27736), and then revised in 1981 (46 *Fed. Reg.* 9404) and in 1984 (49 *Fed. Reg.* 31212).

Section 307(b)(1) of the Act provides that the granting of any removal credits may "not prevent sludge use or disposal by such [POTW] in accordance with section 1345 of this Title . . . ." 33 U.S.C. § 1317(b)(1). Accordingly, EPA's removal credit regulations, as promulgated in 1978 and as repromulgated in amended form in 1981 and 1984, have consistently authorized the granting of removal credits only if the credits do not prevent a POTW from complying with any sludge requirements in effect at the time the POTW applies for EPA approval of removal credits. 40 C.F.R. § 403.7(a)(3)(iv) (1985).[5] Indeed, EPA has gone beyond the requirements of Section 307(b) of the Act by providing that removal credits are contingent upon compliance not only with Section 405 of the Act, but also with any other applicable federal, state or local requirements. In particular, removal

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[5] EPA's 1984 general pretreatment regulations made certain modifications to the 1978 and 1981 removal credit provisions, but the regulations have remained essentially the same as they relate to sludge use and disposal. The regulations provide that a POTW may grant credits to reflect consistent removal by the POTW of pollutants regulated in EPA pretreatment standards provided that various conditions are met. 40 C.F.R. § 403.7(a)(2) (1985).

credits may be granted only if the credits "will not cause the POTW to violate the local, State, and Federal Sludge Requirements which apply to the sludge management method chosen by the POTW."[6]

Suits challenging the 1978 and 1981 general pretreatment regulations were consolidated and heard by the Third Circuit in *National Association of Metal Finishers* v. *EPA*, 719 F.2d 624 (3d Cir. 1983), *rev'd in part sub nom. Chemical Manufacturers Association* v. *NRDC*, 470 U.S. 116 (1985). While other issues relating to EPA's removal credit regulations were contested in this prior litigation, the Natural Resources Defense Council never challenged the adequacy of the sludge disposal requirements in the 1978 or 1981 removal credits regulations.

B. The Proceedings Below

NRDC challenged EPA's 1984 removal credits regulations on a number of grounds. In its most broad-based attack, NRDC claimed that EPA's rules were unlawful because removal credits could be approved

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[6] 40 C.F.R. § 403.7(a)(3)(iv) (1985). Sludge may be managed in a variety of ways, such as disposal on land for use as a soil conditioner, landfilling, incineration, and ocean dumping. As noted above, EPA's regulations extend beyond the requirements of Section 405 of the Act and condition removal credits upon compliance with any federal, state and local sludge restrictions. Federal sludge requirements are defined to mean statutory provisions, regulations and permits under Section 405 of the Clean Water Act, and several other federal programs including the Solid Waste Disposal Act, the Clean Air Act, and the Toxic Substances Control Act. *Id.* § 403.7(a)(1)(ii) (1985). EPA thus chose to implement the sludge disposal condition in Section 307(b) for granting removal credits in a broad fashion to incorporate a number of relevant federal and state programs, including Section 405 of the Act.

even though EPA had not promulgated comprehensive regulations for sludge use and disposal under Section 405 of the Act. NRDC characterized EPA's existing sludge regulations as "skeletal," and argued that they did not represent full compliance with Section 405. NRDC relied principally on EPA studies and documents stating that the Agency planned to develop additional sludge regulations in the future. EPA argued in response that since the sludge disposal provisions of the removal credit regulations had not changed since 1978, NRDC's challenge to those provisions was untimely and that the court of appeals therefore lacked jurisdiction to consider NRDC's claim. EPA also argued that it had already promulgated a substantial number of sludge regulations and that, while it may supplement those regulations in the future, Congress had not made the availability of removal credits contingent upon such further rulemaking.

The Third Circuit accepted all of NRDC's attacks on the removal credit regulations. Despite the fact that none of EPA's sludge use or disposal regulations were before the court, the court held that Section 405(d) of the Act required "comprehensive standards for sludge disposal," and that EPA's sludge disposal regulations were inadequate. (Appx. at A-50 — A-51) Calling EPA's reliance on other federal, state and local requirements a "regulatory patchwork," the Third Circuit accepted NRDC's argument that certain aspects of sludge disposal were not specifically regulated. (Appx. at A-50) However, neither the court's opinion nor NRDC's brief below contained any detailed discussion of the existing federal, state and local requirements. Indeed, the court appears to have

reached its decision more on policy than legal grounds, stating that EPA's sludge regulations "do nothing to advance the congressional goal of making sludge into a productive asset rather than a toxic liability." (Appx. at A-51) The Third Circuit also rejected EPA's argument that NRDC's challenge regarding the sludge provisions of the removal credits regulations was barred by Section 509 of the Act, stating that the 1984 removal credit rules were different from prior rules, and that in any event EPA had submitted the entire 1984 rule for public comment. (Appx. at A-48)

REASONS FOR GRANTING THE WRIT

This Court should grant this petition for *certiorari* for three reasons that the Court has traditionally found compelling. First, the decision below raises an issue of national importance concerning a major EPA program. Second, the decision below conflicts with decisions of this Court and other circuit courts in ruling on the adequacy of sludge use and disposal regulations not reviewable in the courts of appeals. Third, contrary to recent decisions of this Court, the decision below upsets EPA's reasonable and long-standing construction of the Act.

I. The Decision Below Presents Important Questions Of Law That Should Be Settled By This Court.

The decision of the Third Circuit that EPA's removal credit regulations are invalid undermines a central feature of the pretreatment program. This program is of singular importance to current efforts under the Clean Water Act to reduce the discharge of pollutants. The Third Circuit's decision, issued as pretreatment standards are being implemented for the nation's major industries, will result in the expendi-

tures of enormous sums of money for redundant treatment and will disrupt local pretreatment programs that were developed at considerable public expense over many years.

Many public agencies have developed local pretreatment programs under Section 402(b)(8) of the Clean Water Act. As an integral part of those pretreatment programs, a number of POTWs have applied for and received approval, or have applications under development or pending approval, to grant removal credits under EPA's current regulations.[7] Where credits have already been authorized, the approval for such credits is reflected in federal and state discharge permits issued to POTWs under the Clean Water Act, 33 U.S.C. § 1342 (1982). The credits also have been incorporated in local permits issued to industrial dischargers or in contracts between POTWs and their industrial users, as well as in municipal sewer service ordinances or regulations. Public agencies have invested considerable public resources in the development of pretreatment programs tailored to the particular facts and circumstances of the communities they serve. Since removal credit authority is an integral component of a POTW's pretreatment strategy, the decision of the Third Circuit in this case places in jeopardy those investments of time, money and commitment made over many years. Industry groups have also invested time and resources in assisting in the development of POTW removal credit applications. The Third Circuit's decision has put under a cloud elements of local ordinances, permits or

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[7] *See, e.g.*, the motion by the City of Albuquerque, Metropolitan Sanitary District of Greater Chicago, *et al.* for leave to intervene below.

contracts between local industries and POTWs, pretreatment program approvals, and federal/state discharge permits.

The court's decision will have a major adverse impact on industrial dischargers to POTWs. For example, EPA estimates that compliance with pretreatment standards for the organic chemicals, plastics and synthetics fibers industry alone—absent removal credits—would cost $304 million in capital and $166 million in annual operating and maintenance costs. 50 *Fed. Reg.* 29068, 29097 (1985). Removal credits would reduce these costs substantially by avoiding redundant treatment.[8] In cases where a POTW is removing part or all of a pollutant, an industrial discharger need not incur costs to provide the same removal.

By holding that removal credits may not be issued until EPA has promulgated a comprehensive set of sludge use and disposal regulations, the Third Circuit has effectively precluded the issuance of timely removal credits, not only for the organic chemicals industry but for other industries as well. Additional sludge guidelines have not even been proposed by EPA, and according to the Agency's latest regulatory agenda, these additional guidelines are not scheduled

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[8] In the context of a proposal several years ago to establish national removal credits, EPA estimated that such credits could result in substantial cost savings for the electroplating industry alone. For one group of electroplaters, EPA estimated that removal credits could save approximately $223 million in capital costs and $84 million in annual operating costs. For another segment of the industry, EPA projected savings of about $22.5 million in capital costs and $7.5 million in annual operating costs. 47 *Fed. Reg.* 42698, 42703 (1982).

to be promulgated until September 1987. 51 *Fed. Reg.* 14552 (1986). After the guidelines are issued, it will take many months for POTWs to prepare removal credit applications, to submit them to EPA for review, and to implement removal credits at the local level. This process can be expected to take well over a year. In the meantime, time is running for compliance with pretreatment standards for most industries, and money is being spent now for the design and installation of treatment technology. Therefore the granting of credits two years hence will come too late to avoid the expenditure of funds for redundant treatment.[9]

Thus, the Third Circuit's decision conditioning credits on the development of more comprehensive sludge guidelines will have a major impact on the organic chemicals industry, as well as other industries whose pretreatment standards have already been promulgated and who are now making decisions about what treatment technology must be installed to meet those standards.

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[9] EPA is now scheduled to issue pretreatment standards for the chemical industry by December 1986, and will presumably grant the industry the statutory three-year period of time for compliance, which is necessary to design and install treatment technology to meet the standards. By the time removal credits might be approved, two years of the industry's compliance time already would have elapsed, and enormous sums of money would have been spent in the design and installation of treatment systems.

II. The Decision Below Conflicts With Decisions Of This Court And Numerous Courts Of Appeals In Ruling On The Adequacy Of Regulations Not Reviewable In The Courts Of Appeals.

It is one of the most basic principles of federal jurisdiction that the courts of appeals are courts of limited jurisdiction, with only such jurisdiction as is expressly granted to them by statute. *American Federation of Labor* v. *NLRB*, 308 U.S. 401 (1940); *Assessors* v. *Osbornes*, 76 U.S. (9 Wall.) 567 (1870). Although there may be policy reasons for judicial review, the courts may not expand that limited jurisdiction without express authorization from Congress. *American Federation of Labor* v. *NLRB*, *supra*, 308 U.S. at 411-412. It is the responsibility of this Court to ensure that the statutory limits and bounds of the lower courts' jurisdiction are not exceeded. *Sumner* v. *Mata*, 449 U.S. 539, 547 n.2 (1981); *Louisville & Nashville Railroad Co.* v. *Mottley*, 211 U.S. 149, 152 (1908).

While Congress could have vested original jurisdiction in the courts of appeals to review virtually all EPA regulations of general applicability under the Clean Water Act, as it did under other environmental statutes,[10] it declined to do so. Instead, Section 509(b)(1) provides for original court of appeals jurisdiction over EPA action in only six

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[10] *See, e.g.*, 42 U.S.C. § 7607(b)(1) (1982) (authorizing court of appeals review of eight specified categories of action and "any other nationally applicable regulations promulgated or final action taken" under the Clean Air Act); and 42 U.S.C. § 6976(a)(1) (1982) (authorizing the filing with courts of appeals of "a petition for review of action of the Administrator in promulgating any regulation" under the Resource Conservation and Recovery Act).

enumerated situations.[11] In *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 124, 136 (1977), this Court held that EPA's action in establishing effluent guidelines regulations was reviewable in the courts of appeals because the rules in question fell within the provisions specifically enumerated under Section 509(b) of the Act. A number of U.S. circuit courts have also held that the courts of appeals have no power to review EPA actions not specifically enumerated in Section 509 of the Act.[12] It is clear that none of the enumerated actions in Section 509 has anything to do with review of sludge use and disposal regulations under Section 405 of the Act. Therefore, the Section 405 regulations may not be reviewed in

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[11] These are EPA actions:

"(A) in promulgating any standard of performance under section 1316 of this title,

"(B) in making any determination pursuant to section 1316(b)(1)(C) of this title,

"(C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title,

"(D) in making any determination as to a State permit program submitted under section 1342(b) of this title,

"(E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, or 1316 of this title, and

"(F) in issuing or denying any permit under section 1342 of this title . . . ." 33 U.S.C. § 1369(b)(1) (1982).

[12] *See* City of Baton Rouge v. EPA, 620 F.2d 478 (5th Cir. 1980) (court of appeals has no jurisdiction to review EPA order requiring compliance with NPDES permit); Bethlehem Steel Co. v. EPA, 538 F.2d 513 (2d Cir. 1976), and Homestake Mining Co. v. EPA, 584 F.2d 862 (8th Cir. 1978) (court of appeals has no jurisdiction to review state water quality standards).

the courts of appeals. Instead, EPA's Section 405 regulations would be reviewable in federal district court under 28 U.S.C. § 1331 (1982).

Yet the Third Circuit did review the adequacy of the Section 405 sludge regulations in ruling on NRDC's challenge to the removal credit regulations. The court ruled that Section 405 mandated "comprehensive standards for sludge disposal." It held that EPA could not rely upon regulations promulgated under other federal laws to satisfy its obligations under Section 405, and ruled that EPA's existing sludge regulations were inadequate because they "do nothing to advance the congressional goal of making sludge into a productive asset rather than a toxic liability." (Appx. at A-51)

NRDC may argue that since EPA's pretreatment regulations refer to sludge rules under Section 405 of the Act, that reference gives the court of appeals ancillary jurisdiction to review the merits of EPA's Section 405 sludge rules. However, as discussed below, nothing in Section 307(b) of the Act conditions removal credits on the existence of comprehensive sludge rules. Moreover, this is not a case where the Section 405 regulations were developed on the same record as the general pretreatment standards, and thus where an argument can be made that the court of appeals has ancillary jurisdiction over the Section 405 regulations. *Cf. E.I. du Pont de Nemours & Co.* v. *Train, supra,* 430 U.S. at 125 n.14. In a case under the Clean Air Act, which has similar judicial review provisions,[13] the Seventh Circuit held that

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[13] *See* Peabody Coal Co. v. Train, 518 F.2d 940 (6th Cir. 1975) and cases discussed therein.

such a collateral attack on prior EPA regulations must fail. In *Granite City Steel Co.* v. *EPA*, 501 F.2d 925, 926 (7th Cir. 1974), the court of appeals stated:

> The Company did not petition this Court to review the December 31, 1974, attainment date in the Illinois rule when it was approved by the EPA on May 31, 1972. Such a petition had to be filed within 30 days from that approval under Section 307(b)(1) of the Clean Air Act (42 U.S.C. § 1857h-5(b)(1)). Although the Company formally disclaims any attack on the December 31, 1974, date, it is now attacking the increment of progress dates in the federal rule on the ground that the attainment date itself is unreasonable. Such a collateral attack would evade the time period for reviewing the attainment date and cannot be countenanced.

In addition, the decision below is contrary to numerous decisions of the courts of appeals strictly construing the requirement of Section 509(b) of the Clean Water Act that suits challenging enumerated EPA actions be commenced within 90 days.[14] EPA's sludge regulations under Section 405 of the Act were promulgated in 1979, and amended in certain respects in

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[14] Sun Enterprises, Ltd. v. Train, 532 F.2d 280 (2d Cir. 1976) (rejecting claim of new evidence constituting grounds for review); Peabody Coal Co. v. Train, 518 F.2d 940 (6th Cir. 1975) (dismissing petition filed 92 days after EPA's action); American Ass'n of Meat Processors v. Costle, 556 F.2d 875 (8th Cir. 1977) (dismissing argument as to uncertainty regarding the proper forum for challenging EPA effluent guidelines); Homestake Mining Co. v. EPA, 584 F.2d 862 (8th Cir. 1978) (dismissing suit filed four days after the statutory period expired).

1981. 40 C.F.R. Part 257 (1985).[15] NRDC has never filed suit challenging the adequacy of the Section 405 rules. Thus, even if the Section 405 rules were deemed reviewable under Section 509(b) of the Act, NRDC's suit would nonetheless be barred.

NRDC's failure to pursue the Section 405 sludge regulation issues in the proper manner, in violation of the jurisdictional provisions of the Act, causes great prejudice to all affected parties. If NRDC had challenged the EPA sludge rules in 1979 or 1981 (or had NRDC promptly challenged the sludge provisions in the 1978 or 1981 removal credit regulations), the Section 405 issues would almost certainly have been resolved by now. Because NRDC chose to wait up to eight years to file suit, the decision below will result in considerable disruption to the pretreatment program. *See* pages 9-12 above.

III. Contrary To Recent Decisions Of This Court, The Decision Below Upsets EPA's Reasonable Construction Of The Act.

The Supreme Court has held that in deciding whether EPA regulations are in conformity with the statute, the Court need not find that EPA's construction of the statute is the only permissible construction, but simply that EPA's construction is "a sufficiently rational one to preclude a court from substituting its judgment for that of EPA." *Chemical Manufacturers Association* v. *NRDC*, 105 S.Ct. 1102, 1108 (1985); *see also Chevron* v. *NRDC*, 467 U.S. 837, 842-45 (1984). In the present case, the Third Circuit has overturned EPA's reasoned construction of the

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[15] 44 *Fed. Reg.* 53460 (1979). Certain amendments were published in 1981. 46 *Fed. Reg.* 47052 (1981).

Act on grounds which appear to relate more to policy concerns than to the language and history of the Act.

The court below held that under Section 307(b)(1) of the Clean Water Act, removal credits may only be granted if EPA has promulgated a "*comprehensive framework*" to regulate sludge use and disposal. (Appx. at A-52) (Emphasis added.) Under the court's ruling, it is not sufficient that a POTW comply with guidelines under Section 405(d) of the Act and all other applicable federal, state and local sludge use and disposal requirements. (Appx. at A-50 — A-51) The court found an absence of a "comprehensive framework" of Section 405 regulations, and thus held that credits may not be granted. The decision below overlooks the plain language of the statute and the legislative history.

Section 307(b)(1) of the Act says nothing about a comprehensive set of sludge guidelines. It simply requires that the granting of any removal credits "not prevent sludge use or disposal by such [POTW] in accordance with section 1345 of this Title . . . ." 33 U.S.C. § 1317(b)(1). The natural reading of this provision is that removal credits must be consistent with any applicable sludge use and disposal requirements—not some comprehensive set of requirements that might be developed in the future.

The language of Section 405 of the Act confirms this interpretation of the removal credits provision. Section 405(d) of the Act requires EPA to publish sludge use and disposal regulations within one year of enactment (*i.e.*, by December 1978) and from time to time thereafter. 33 U.S.C. § 1345(d) (1982). Congress understood that EPA could not be expected immediately to have a complete, comprehensive set

of rules in place, and thus envisioned that they would be established over a period of years. Moreover, nothing in Section 405(d) of the Act mentions a "comprehensive" set of rules. It simply directs EPA to identify uses of sludge, various factors to be taken into account in determining disposal measures, and concentrations of pollutants that interfere with each such use. *Id.* This directive is very general in nature and gives EPA considerable latitude in determining appropriate guidelines and developing the guidelines over time. Yet the decision below requires that there be some undefined comprehensive program in place before POTWs may grant removal credits.

As the Third Circuit recognized, EPA has promulgated sludge disposal criteria under Section 405 and has issued rules governing the use and disposal of sludge under other federal statutes as well.[16] The

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[16] The Section 405 criteria include location and groundwater criteria, prohibit the open burning of sludge and restrict landfilling and landspreading of sludge under certain circumstances. Rules governing sludge disposal under other statutes are also applicable. If sludge is hazardous, land disposal is governed by 40 C.F.R. Parts 260-71 (1985), pursuant to the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901, *et seq.* (1982 & Supp. II 1984). Ocean dumping is governed under 40 C.F.R. Parts 220-228 (1985), pursuant to the Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. §§ 1412, 1418 (1982). Ocean discharge is regulated under the permitting criteria of 40 C.F.R. Part 125, subpart M (1985) and the restrictions of Section 301(h) of the Clean Water Act, 33 U.S.C. § 1311(h) (1982). Sludge incineration is regulated pursuant to several programs under the Clean Air Act, 42 U.S.C. § 7401, *et seq.* (1982 & Supp. II 1984), and the Toxic Substances Control Act, 15 U.S.C. § 2601, *et seq.* (1982), including state implementation plans and permitting requirements under 40 C.F.R. Parts 51-52 (1985); new source performance standards under 40 C.F.R. Part 60,

Third Circuit refers to these restrictions on sludge disposal as a "regulatory patchwork" (Appx. at A-50), but it is quite logical for EPA to rely on rules developed under statutory programs directed at particular means of disposal. For example, the Clean Air Act establishes a comprehensive set of mechanisms for regulating air emissions. *See, e.g., Chevron* v. *NRDC, supra.* It makes perfect sense for EPA to say that incineration of sludge will be governed by the requirements of the Clean Air Act.[17]

In understanding what Congress meant in Section 307(b) of the Act, Section 405(e) is significant. The Third Circuit read Section 307(b) as if it referred only to Section 405(d) of the Act; it does not. Instead, Section 307(b) refers to all of Section 405, including Section 405(e), which makes clear that POTWs must comply only with whatever sludge use and disposal regulations are in effect. Congress could in theory have provided that no disposal of POTW sludge would be lawful unless it complied with a comprehensive set of EPA guidelines—but Congress did not do so. Congress apparently recognized that development of environmental rules on an issue as complex as sludge takes time, and thus must be phased in over time. Accordingly, Congress provided in Section 405(e) only

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subpart O (1985); national emission standards under 40 C.F.R. Part 61, subpart E (1985); and control requirements under 40 C.F.R. Part 761, subpart D (1985).

[17] For example, EPA recently proposed to modify the new source performance standards for incineration of sewage sludge by sewage treatment plants. 51 *Fed. Reg.* 13424 (1986). EPA noted that the proposal "relies on the authority of the Clean Air Act, and does not require the use of the authority of Section 405 of the Clean Water Act for its implementation." *Id.* at 13425.

that it is unlawful to dispose of sludge "for any use for which guidelines have been established pursuant to subsection (d) of this section, except in accordance with such guidelines."[18] The import of this language is clear—a POTW must comply only with applicable sludge guidelines, not some set of rules that EPA might someday establish given sufficient time, data and resources.

The decision below is also contrary to the intent of Congress. The Conference Report on the 1977 Amendments to the Act, which enacted Section 405, states as follows:

> The determination of the manner of disposal or use of sludge is a local determination except that *if* a guideline has been established for a use it is thereafter unlawful for the owner or operator of a [POTW] to dispose of sludge from such works for that use except in accordance with the guideline.[19]

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[18] Section 405(e) of the Act, 33 U.S.C. § 1345(e) (1982), provides as follows:

> The determination of the manner of disposal or use of sludge is a local determination except that it shall be unlawful for the owner or operator of any publicly owned treatment works to dispose of sludge from such works for any use for which guidelines have been established pursuant to subsection (d) of this section, except in accordance with such guidelines.

[19] H.R. Rep. No. 830, 95th Cong., 1st Sess. 87 (1977), *reprinted in* Vol. 3, *A Legislative History of the Clean Water Act of 1977*, Cong. Research Service, No. 14 (Comm. Print 1978) at 271 (hereinafter "1977 *Leg. Hist.*").

This point was emphasized by Representative Anderson, one

(*footnote continues*)

Once again, not a word is said about a "comprehensive framework" for sludge disposal. Congress directed EPA to establish guidelines it finds appropriate, and POTWs are allowed to dispose of their sludge in any manner they choose, so long as they comply with those guidelines.

In interpreting Section 307(b), the Third Circuit summarily rejected EPA's construction of that provision, which had been unchanged since Section 307(b) was enacted. The court did not analyze the language of Sections 307(b) or 405(d), and did not even mention Section 405(e) or the legislative history cited above. In substituting its own policy judgment for that of EPA, the court has violated the fundamental principles set forth by this Court in *Chemical Manufacturers Association* v. *NRDC*, *supra*, and *Chevron* v. *NRDC*, *supra*.

(*footnote continued*)
of the Conferees on the 1977 Amendments, who described Section 405 as follows:

> The determination of the manner of sludge use or disposal is a local determination. However, once EPA has published guidelines for a sludge use or disposal, it is unlawful for the owner or operator of a municipal treatment works to use or dispose of sludge except in accordance with such guidelines.

1977 *Leg. Hist.* at 404.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-3530

NATURAL RESOURCES DEFENSE COUNCIL, INC.
Petitioner

v.

U. S. ENVIRONMENTAL PROTECTION AGENCY
Respondent

CHEMICAL MANUFACTURERS ASSOCIATION
Intervenor

CHICAGO ASSOC. OF COMMERCE & INDUSTRY, ILLINOIS MANUFACTURERS' ASSOC. AND MID-AMERICA LEGAL FOUNDATION
Intervenors

No. 85-3012

CERRO COPPER PRODUCTS COMPANY, AND VILLAGE OF SAUGET
Petitioners

v.

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
and
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Respondents

NATURAL RESOURCES DEFENSE COUNCIL, INC.
Intervenor

On Petition for Review of a Final Rule
Issued by the United States
Environmental Protection Agency

Argued September 10, 1985

BEFORE: HUNTER, GARTH, and HIGGINBOTHAM.
Circuit Judges

(Opinion filed April 30, 1986)

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OPINION OF THE COURT

GARTH, *Circuit Judge:*

These consolidated petitions challenge an amended final rule of the Environmental Protection Agency (EPA), known as the removal credit rule, 49 Fed. Reg. 31212 (1984) codified at 40 C.F.R. § 403.7), promulgated pursuant to the Federal Water Pollution Control Act ("FWPCA" or "Clean Water Act") of 1977, Pub. L. No. 95-217.91 Stat. 1566 (codified at 33 U.S.C. 1251 *et seq.*).

The Clean Water Act of 1972 set as a national goal the Elimination, by 1985, of the discharge of pollutants into the nation's navigable waters. Pub. L. No. 92-500, 86 Stat. 816 § 101(a)(1) (codified at 33 U.S.C. § 1251(a)(1)). In 1977, recognizing that the 1972 Act's regulatory mechanism for the control of toxics"ha[d] failed," Congress amended the Clean Water Act to clarify and strengthen its provisions for dealing with toxic pollutants. Leg. Hist. 326-27[1] (comments of the House manager of the bill, Rep. Roberts); *see also id.* at 369 (statement of Rep. Clausen); *id.* at 427 (statement of Sen. Muskie).

One aspect of the 1977 Act's strengthened program to control toxic pollutants was a requirement that an indirect discharger i.e. an industrial discharger whose wastes flow into a public sewage system rather than directly into navigable waters, had to "pretreat" its waste waters so as to achieve, together with the Publicly Owned Treatment Works (POTW) that treated the waste before final discharge into navigable waters, the same level of toxics removal as was required of a direct discharger, which discharged directly into a river, lake, or ocean. At the same time, the Act allowed the indirect discharger to re-

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[1] Citations to the legislative history, unless otherwise indicated, are to Senate Comm. on Environment and Public Works, A Legislative History of the Clean Water Act of 1977 (Comm. Print 1978) (prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress).

ceive a "removal credit" from the POTW for the amount of waste removed from the stream of waste water by the POTW itself. 33 U.S.C. § 1317(b)(1). This provision, designed to avoid redundant treatment, permits an increased amount of pollutants to flow from the indirect discharger's plant to the municipal treatment plant provided that the additional pollutants are removed by the municipal plant. By this process, the amount of pollutants ultimately discharged by the combination of the indirect discharger and the POTW will be no greater than the amount discharged by the direct discharger.

The Act also required EPA to develop regulations for the disposal and utilization of POTW sewage sludge, so as to prevent contamination of the sludge with toxics removed from the effluent flowing through the POTW, and so as to encourage the productive recycling of sludge. In furtherance of this goal, the Act provided that POTWs could not grant removal credits to indirect dischargers for the POTW's removal of toxics from the liquid waste stream if this removal and consequent transfer of toxics to the POTW sludge would render the sludge toxic and thus prevent sludge disposal in accordance with those regulations. 33 U.S.C. § 1317(b)(1).

NRDC challenges four aspects of the removal credit rule. First, it argues that EPA's methods of calculating waste removal by POTWs violates the statutory requirement that direct and indirect dischargers be held to the same standard. Second, it argues that EPA's decision to ignore sewer overflow events in calculating the amount of toxic waste removed by a POTW violates the same requirement. Third, NRDC claims that EPA's action in modifying the test for determining when a credit must be withdrawn violates the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, and the Clean Water Act, 33 U.S.C. § 1251 *et seq.* Fourth, NRDC questions whether EPA may put into effect a relaxed removal credit rule when the sludge regulations that

are a precondition for issuance of such credits have not been promulgated.

In each of these areas, we conclude that EPA's 1984 removal credit regulations fail to meet statutory requirements. Furthermore, even extending the utmost deference to the Agency, we conclude that the promulgation of these regulations on the basis of the administrative record before us is arbitrary and capricious. Thus we grant NRDC's petition for review.

In contrast to NRDC, Petitioners Cerro Copper and Village of Sauget challenge the regulations as too strict and inflexible to take into account situations such as theirs. The petitions of Cerro Copper and the Village of Sauget will be denied.

I.

In order to understand the issues presented on this appeal, it is helpful to trace the history of the statute and regulations which were designed to eliminate the discharge of pollutants into our waters.

A.

The removal credit rule at issue here is a part of a complex regulatory framework mandated by the Federal Water Pollution Control Act Amendments of 1972 and 1977, 33 U.S.C. §§ 1251 *et seq.* The statute calls for a two-phase program to limit discharges of effluence. Direct dischargers of toxic wastes were to comply with the Best Practicable Control Technology (BPT) by July 1, 1977, 33 U.S.C. §§ 1311(b)(1)(A), 1314(b)(1). Between 1983 and 1987, direct dischargers of toxic wastes were to meet the more stringent standards consistent with the Best Available Technology economically achievable (BAT), 33 U.S.C. § 1311(b)(2). The statute also mandated that the EPA set effluent limitations for POTWs engaged in the treatment

of municipal sewage or industrial wastewater.[2] *Id.* §§ 1311 (b)(1)(B)-(C), 1314(d)(1). Such limitations were to result in equal levels of treatment for all toxic discharges, whether issued directly into navigable waters or channelled by a sewage system through a POTW.

Because secondary treatment by POTWs cannot deal adequately with toxic pollutants, the statute required that EPA establish national pretreatment standards, i.e. standards to which an indirect discharger must conform in treating its waste before such waste reaches the POTW. Those standards, applicable to indirect dischargers, provide for pretreatment which is equivalent to BAT standards. 33 U.S.C. 1317 (b)(1).[3]

In order to avoid redundant treatment by the indirect discharger and the POTW ("treatment for treatment's sake," Leg. Hist. 343), section 307(b)(1) of the 1977 Act, 33 U.S.C. § 1317(b)(1), requires that the POTW be authorized to give credit to the indirect discharger for removal of pollutants achieved by the POTW. The removal credit provision thereby equates the amount of pollutants removed by the combined treatment of the POTW and the indirect discharger with the amount of pollutants removed by the direct discharger operating under the relevant BAT standard. 33 U.S.C. § 1317(b)(1).

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[2] There are three levels of wastewater treatment. Primary treatment refers to a physical sedimentation process for removing settleable solids. Secondary treatment refers to a physical/biological process for removing solids and pollutants characterized by biological oxygen demand and pH. Tertiary treatment involves processes which remove other pollutants such as non-biodegradable toxics. *See Assessment of the Impacts of Industrial Discharges on Publicly Owned Treatment Works* 1:7 (report prepared for EPA by JRB Associates) (1981) (App.192): *see also* Leg. Hist. 329-30. The statute requires that existing POTWs meet standards based on secondary treatment. Tertiary treatment is ordinarily provided only by industrial dischargers or by specially designed POTWs.

[3] Section 307(b)(1) of the Clean Water Act, 33 U.S.C. § 1317(b)(1), is reproduced in its entirety in the Appendix as Exhibit A.

The removal credit provision was added to the statute by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1589. That law was enacted in response to Congress's recognition of the growing seriousness of the problems of toxic pollution, and of the woeful inadequacy of the 1972 Act in dealing with them. Leg. Hist. 326-27, 454-55, 862-65.

The 1977 Act strengthened the controls over toxic pollutants in several ways. The 1977 Act explicitly codified the toxics consent decree issued by the District Court for the District of Columbia. That decree resulted from litigation brought by environmental groups to challenge EPA's failure to promulgate the effluent standards mandated for toxic substances by the 1972 Act. *See NRDC v. Train*, 8 Env't Rep. Cas. (BNA) 2120 (D.D.C. 1976), *modified sub nom. NRDC v. Costle*, 12 Env't Rep. Cas. (BNA) 1833 (D.D.C. 1979), *modified sub nom. NRDC v. Gorsuch*, No. 72-2153 (D.D.C. Oct. 26, 1982), *modified sub nom. NRDC v. Ruckelshaus*, No. 73-2153 (D.D.C. Aug. 2, 1983 and Jan. 6, 1984). Following that decree, Congress required that BAT effluent guidelines, applicable to direct dischargers, be developed by July 1, 1980 for the 65 toxic pollutants listed in the decree. Pub. L. No. 95-217, § 53(a), 91 Stat. 1589 (codified at 33 U.S.C. § 1317(a)(2)). Also following the toxics decree, the 1977 Act amended section 307(b)(1) of the Act, 33 U.S.C. § 1317(b)(1), to require EPA to promulgate pretreatment regulations for indirect dischargers analogous to the BAT standards for direct dischargers.[4] Congress stressed that pretreatment standards had to be based on BAT or more stringent limits. *See* 33 U.S.C. § 1317(a); Leg. Hist. at 271, 342, 403, 461, 690.

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[4] It is fairly arguable that the 1972 Act already required EPA to do what the toxics consent decree mandated. In any case, the 1977 Act clarified the congressional intent to cleanse the nation's waters of toxic pollutants.

While strengthening and clarifying the pretreatment requirements for toxics, Congress added the following provision to the statute, thus providing for removal credits to avoid redundant treatment:

> If, in the case of any toxic pollutant under subsection (a) of this section introduced by a source into a publicly owned treatment works, the treatment by such works removes all or any part of such toxic pollutant and the discharge from such works does not violate that effluent limitation or standard which would be applicable to such toxic pollutant if it were discharged by such source other than through a publicly owned treatment works, and does not prevent sludge use or disposal by such works in accordance with section 1345 of this title, then the pretreatment requirements for the sources actually discharging such toxic pollutant into such publicly owned treatment works may be revised by the owner or operator of such works to reflect the removal of such toxic pollutant by such works.

33 U.S.C. § 1317(b)(1).[5]

In addition, Congress sought to ensure that sewage sludge, instead of becoming a depository for toxic pollutants, should be usable as fertilizer or for other productive purposes. It did so by amending section 405 of the Clean Water Act to require EPA to develop regulations for sludge use or disposal within one year of the statute's enactment. 33 U.S.C. § 1345(d).

In conjunction with this amendment to section 405, Congress also amended section 307(b)(1) of the Act to ensure that EPA did not, in the course of administering the removal credit program, undermine the objective of rendering sewage sludge nontoxic and usable. By the same

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[5] As we discuss below, the concept of removal credits had already been adopted by EPA in its 1973 pretreatment regulations.

amendment, quoted above, that provided for removal credits, Congress also prohibited for granting of removal credits if such credits would lead to sludge contamination that would prevent the use of disposal of sludge in conformity with the section 405 regulations. FWPCA 307(b)(1), 33 U.S.C. § 1317(b)(1).[6]

B.

The removal credit regulation at issue here allows POTWs to grant removal credits to indirect dischargers so that the indirect discharger may increase its dischargers of the pollutant by the amount that the POTW removes. The statute mandates that such credits be equal to the amount of toxics *consistently* removed by the POTW.

The regulation requires that each POTW first determine its removal efficiency (or "consistent removal rate") for each regulated pollutant. This is generally done through a process of measuring the concentration of a given pollutant found in the waste flowing into a POTW (i.e., the influent) and then measuring its concentration in the waste flowing out of the POTW (i.e., the effluent). Removal is expressed as a percentage of the amount in the influent. If, for example, a POTW consistently removes 60% of a particular pollutant that flows into it, it can grant a 60% credit to the indirect discharger. The indirect discharger would then be permitted to discharge more than twice as

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[6] Congress also increased EPA'S power to enforce the pretreatment program. New section 309(f), 33 U.S.C. § 1319(f), gave EPA direct enforcement authority against industrial users violating pretreatment standards, so that EPA would not be forced to rely solely on municipalities for enforcement. Amended section 402(b)(8), 33 U.S.C. § 1342(b)(8), ensured timely identification of pollutants discharged by indirect dischargers to POTWs.

New enforcement provisions were also enacted to ensure compliance with the new section 405 sludge regulations. FWPCA §§ 309(a)(1), (a)(3), & (d), 33 U.S.C. §§ 1319(a)(1), (a)(3), & (d).

much of that pollutant to the POTW than it would otherwise have been allowed to discharge.[7]

The removal credit rule is one part of the General Pretreatment Regulations for Existing and New Sources of Pollution, 40 C.F.R. § 403.1-16 (1984). These pretreatment regulations provide the framework for implementation of another set of regulations, the Categorical Pretreatment Standards, which establish specific limits for the discharge of particular toxic pollutants.

The present removal credit rule is the fourth version of the rule promulgated by EPA on this subject. The first version, promulgated in 1973, was sketchy. It foreshadowed the statutory removal credit provision of section 1317(b)(1) enacted in 1977. 38 Fed. Reg. 30982-84 (1973). In 1977, EPA promulgated more complete regulations. Each of the two succeeding versions following the 1977 version has further relaxed the requirements that POTWs and indirect dischargers are required to meet. From the first regulations through all subsequent revisions, the regulations purport to require that indirect dischargers be held to the same standard as direct dischargers, subject to credit for removal of toxics by the POTW.

In 1977, following the issuance of the toxics consent decree in *NRDC v. Train*, 8 Env't Rep.Cas. (BNA) 2120, EPA proposed more developed pretreatment regulations. 42 Fed. Reg. 6176 (1977). While this proposal was pending, Congress enacted the Clean Water Act amendments of 1977, adding the removal credit provision to section 307(b)(1). After extensive comment and participation by

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[7] For example, if we were to assume a standard that permits the discharge of 20 units per 1000, and if the POTW removes 60% of the pollutants found in the influent, then the indirect discharger can discharge 50 units, which will then be reduced to the permissible standard of 20 units by the POTW before the final discharge into navigable waters. In the absence of removal by the POTW, the indirect discharger itself would, of course, be required to remove all but the 20 units.

interested parties, including four public hearings and sixteen public meetings, which generated testimony and comments from 400 individuals and groups, EPA, on June 26, 1978, promulgated its second removal credit regulations as a part of the General Pretreatment Regulations on June 26, 1978. 43 Fed. Reg. 27736 (1978).

Following adoption of these regulations, industry and environmental groups brought several actions challenging the second removal credit provision. A settlement agreement between EPA and the industry parties led EPA to propose amendments to these regulations. 44 Fed. Reg. 62260 (1979). A third regulation was promulgated on January 28, 1981. 46 Fed. Reg. 9404 (1981).

The revised rules made it substantially easier for POTWs to grant removal credits and to give larger credits for the same pollutant removals. Several industry parties nonetheless again brought suit, contending that the new rules did not go far enough. These actions were consolidated with the actions of environmental groups challenging the 1978 and 1981 regulations, all of which were heard by this Court in *National Association of Metal Finishers v. EPA*, 719 F.2d 624 (3d Cir. 1983) [hereinafter *NAMF*] *reversed in part sub nom. Chemical Manufacturers Ass'n v. NRDC*, 105 S. Ct. 1102 (1985). In *NAMF*, this court upheld the 1981 removal credit rule, rejecting industry arguments similar to, or identical with, those made by EPA here.[8]

At the same time that they were attacking the 1981 regulations in court, the industry petitioners also urged EPA to suspend these same regulations so that they could be reconsidered by the new Administration. *See, e.g.*, let-

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[8] In Chemical Manufacturers Ass'n. v. NRDC, 105 S. Ct. 1102 (1985), the Supreme Court reversed a part of the Third Circuit's judgment in *NAMF*, however, the Supreme Court left undisturbed that portion of the judgment that dealt with removal credits.

ters from Chemical Manufacturers Ass'n to EPA, Mar. 9, 1981 & Mar. 19, 1981, App. 145-51. In fact, EPA did defer the effective date of the 1981 regulations indefinitely, and subsequently proposed to develop yet another removal credits provision. 47 Fed. Reg. 4520 (1982).

In response to a suit brought by NRDC, this Court ruled that EPA's suspension of the pretreatment regulations without notice or opportunity for public comment violated the Administrative Procedure Act, 5 U.S.C. § 553(b)-(e), and that therefore both this initial suspension and a subsequent rulemaking proceding, extending that suspension in part, were illegal. The EPA was therefore ordered to reinstate all of the amendments retroactively to March 10, 1981. *Natural Resources Defense Council v. EPA*, 683 F.2d 752,768-69 (3rd Cir. 1982).

EPA complied with this order on September 28, 1982. 47 Fed. Reg. 42688 (1982). However, on that same day, EPA proposed to amend the removal credit rule once again, on the grounds that it "has been criticized as being so burdensome and unwieldy as to discourage POTWs from applying for and obtaining authorization to grant removal credits." 47 Fed. Reg. 42698 (1982).

The fourth and ostensibly final removal credit rule, which is the one at issue here, was promulgated on August 3, 1984. 49 Fed. Reg. 31212 (1984) (codified at 40 C.F.R. § 403.7) (1985).[9] Among other changes, this rule adopted a new, more lenient, method of measuring the consistency of toxics removal by POTWs. The overall effect of the new rule is that it enables POTWs to grant more and larger credits than under the 1981 rule, which itself constituted a relaxation of the 1978 rule. As a consequence, the requirements for industrial pretreatment have been very significantly reduced.

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[9] The full text of the 1984 removal credit is reproduced in the Appendix as Exhibit C.

Petitioner NRDC filed a timely petition for review of the 1984 (fourth) rule, claiming that whereas the 1981 rule was in compliance with the statute, the 1984 rule has relaxed the conditions for granting removal credits beyond the bounds permitted by the Clean Water Act. Petitioners Cerro Copper and Village of Sauget, in contrast, seek to have the 1984 rule set aside on the ground that, as applied to them, the rule is more severe than the statute allows. In addition, all petitioners present procedural arguments as to why the rule is invalid.

II.

Our standard of review of the Agency's informal rulemaking in this case is governed by section 10(e)(2) of the Administrative Procedure Act, 5 U.S.C. § 706(2), and in particular by subsections (A), (C), and (D), which provide that the reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (C), & (D).

We must first determine whether the regulations are in conformity with the statute. In making this determination, the "view of the agency charged with administering the statute is entitled to considerable deference; and to sustain it, we need not find that it is the only permissible construction that EPA might have adopted but only that EPA's understanding of this 'very complex statute' is a sufficiently rational one to preclude a court from substituting its judgment for that of EPA." *Chemical Manufacturers Association v. NRDC*, 105 S.Ct. 1102 (1985) (interpreting the Clean Water Act); *see also Chevron v. NRDC*, 104 S.Ct. 2778, 2781-83 (1984); *NAMF*, 719 F.2d at 637.

On the other hand, this court may not abdicate its responsibility to interpret the statute in accordance with traditional principles of statutory construction. "[W]hile reviewing courts should uphold reasonable and defensible constructions of an agency's enabling Act . . . they must not 'rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.'" *Bureau of Alcohol, Tobacco, and Firearms v. Federal Labor Relations Authority*, 464 U.S. 89, 97 (1983) (quoting *NLRB v. Brown*, 380 U.S. 278 (1965)); *see also Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 120 (1980); *International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America v. Daniel*, 439 U.S 551, 566 & n.20 (1979); *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 915 (3d Cir. 1981).

Statutory interpretation is one of the traditional functions of courts. Of course, [i]f the intent of Congress is clear, that is the end of the matter; for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron v. NRDC*, 104 S. Ct. 2781-82 (1984). Furthermore, agency action in fulfillment of a statutory mandate is entitled to a presumption of regularity. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). But this presumption is not "equivalent [t]o the presumption of constitutionality afforded legislation drafted by Congress." *Motor Vehicle Manufacturers Ass'n.*, 463 U.S. at 43 n.9. "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron v. NRDC*, 104 S. Ct. 2778, 2782 n.9. We must, therefore, first determine whether EPA's position is at least "within the outer limits of its authority to interpret" the statute. *Teamsters v. Daniel*, 439 U.S. at 566.

Second, we must examine the challenged aspects of the rulemaking procedure carefully to determine independently

that the Agency has not acted unfairly or in disregard of the statutorily prescribed procedures for notice and comment rulemaking. *See, e.g., NAMF*, 719 F.2d at 627-38; *American Iron & Steel Institute v. EPA*, 568 F.2d (3d Cir. 1977).

Third, we must review the substantive aspects of agency action under the arbitrary and capricious standard of 5 U.S.C. § 706(2)(A). This standard has recently been described by the Supreme Court as follows:

> The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., supra*, at 416. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency has not given. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). We will, however, "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transportation, Inc. v. Arkansas-*

> *Best Freight System, Inc., supra,* at 286. See also *Camp v. Pitts,* 411 U.S. 138, 142-43 (1973) *(per curiam).*

Motor Vehicle Manufacturers Ass'n v. State Farm Mutual, 463 U.S. 29, 43 (1983). *See also Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 284 (1974); *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 416 (1971).

We must defer to an agency's expert judgment when it is acting within the scope of the statute, but we cannot allow expertise to shield an irrational decision-making process. "'[U]nless we make the requirements for administrative action strict and demanding, *expertise,* the strength of modern government, can become a monster which rules with no practical limits on its discretion.' . . . We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner. . . ." *Motor Vehicle Manufacturers Ass'n,* 463 U.S. at 48-49 (citations omitted).

Where, as here, an agency has reversed its established interpretation of a statute, the degree of deference accorded to the agency may be somewhat lessened. As this court has said, "sharp changes of agency course constitute 'danger signals' to which a reviewing court must be alert." *NRDC v. EPA,* 683 F.2d at 760 (citation omitted). *See also Motor Vehicle Manufacturers Ass'n v. State Farm Mutual,* 463 U.S. at 42 ("A 'settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least the presumption that those policies will be carried best if the settled rule is adhered to.'" (citation omitted)); *Sierra Club v. United States Army Corps of Engineers,* 772 F.2d 1043, 1046 (2d Cir. 1985) ("A change in something from yesterday to today creates doubt. When the anticipated explanation is not given, doubt turns to disbelief.") An agency is, of

course, free to change its position, but it must supply adequate data and a reasoned analysis to support the change.

We will apply these standards of review first to the challenges raised by NRDC (parts III-IV) and then to the issues raised by Cerro Copper and the Village of Sauget (part VII).

III.

A.

EPA's 1984 removal credit rule provides that the combined *amount* of toxics removed by an indirect discharger and a POTW must equal the amount of toxics removed by the direct discharger. However, as we discuss in greater detail below, EPA's 1984 rule fails to require the same *consistency* in the removal of toxics by POTWs and indirect dischargers as is required of direct dischargers. It therefore violates the statutory requirement of section 307(b)(1) of the Clean Water Act that the indirect discharge of pollutants through a POTW must "not violate that effluent limitation or standard which would be applicable to such toxic pollutant if it were discharged by [a direct discharger]." 33 U.S.C. § 1317(b)(1) (1977).

The BAT (Best Available Technology) limitations and standards issued under the statute require direct dischargers to remove a certain *amount* of each toxic pollutant with a certain degree of *consistency*. BAT limitations and standards have at all times contained these two requirements.[10] Thus, the statutory mandate that the indirect discharger and the POTW together must achieve the same standard of treatment as is required of the direct discharger requires that the standard of treatment be the

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[10] *See, e.g.*, 40 C.F.R. §§ 129.102-129.104 (1984); 40 C.F.R. pts. 405-469 (1984).

same both in *total amount* of toxics removed and in the *consistency* of such removal.

The BAT limits applicable to direct dischargers are based on empirical studies of the amount and consistency of removal that can be achieved by a well-designed and operated plant. These limits require consistency of removal in two important respects. First, they are set so that a discharger can be in compliance virtually all the time. *See, e.g., General Pretreatment Regulations.* 43 Fed. Reg. 27743 (1978). "Guidelines are generally calculated with a 99% confidence level. Therefore, if a discharger exceeds the effluent limitations established by the guideline regulation, there is a 99% certainty that it was caused by discharger error rather than statistical variation." *National Pollutant Discharge Elimination System Permit Regulations,* 49 Fed. Reg. 38019 (1984). Second, the limits fix precise daily maxima as well as monthly averages, neither of which may be exceeded by the direct discharger. The indirect discharger and the POTW must achieve an equivalent consistency in these two respects.

When Congress enacted the 1977 amendments, many of the BAT effluent limitations applicable to direct dischargers had already been promulgated and others were near promulgation. All of them were set so that they could be met 99% of the time, and all of them contained monthly averages and daily maxima. *See, e.g.,* 40 C.F.R. §§ 129.102-129.104 (1984) (effluent standards for endrin, toxaphene, and benzidine); 40 C.F.R. pts. 405-469 (1984) (effluent limitations guidelines for various industrial categories). Congress, in its 1977 amendment to section 307(b)(1) of the Clean Water Act, used the term "effluent limitation or standard," thereby incorporating the consistency requirement of that term into the removal credit provision and making the requirement applicable to POTWs and indirect dischargers.

As previously noted, the Clean Water Act of 1977 not only required indirect dischargers to meet standards equivalent to the BAT standards required of direct dischargers, but also provided for removal credits to avoid redundant treatment of wastes by the POTW and the indirect discharger. It is evident to us, from our reading of the statute, that such removal credits should be made available only when both the consistency and amount of treatment are indeed equivalent to BAT standards.

Under the guise of preventing redundant treatment, EPA has defined the term "consistent removal rate" to encompass POTW pollutant removal that is not consistent at all. Yet in promulgating the first full removal credit rule, in 1978, EPA stated:

> Since direct dischargers are required to comply with their effluent limitations at all times, the EPA believes that the pollutant removal claimed by a POTW should be that removal which occurs virtually all of the time. As used in the regulation (§ 403.7), "consistent" removal is the removal capability that a POTW achieves in 95% of the representative samples taken.

43 Fed. Reg. 27743 (1978). By permitting inconsistent removal, EPA also permits the granting of credits for treatment that is not redundant but mandatory under the statute.

The 1978 rule required the POTW to conduct 12 influent/effluent samplings each year. The consistent removal rate was defined as the lowest of the 12 removal rates in the sample, under the assumption that the POTW would be removing at least that amount 95% of the time. Because POTW removal is more variable than that of direct dischargers, and because EPA believed that it would be too burdensome for POTWs to determine whether they are removing a toxic with 99% consistency, EPA adopted the

95% consistency figure for POTWs as substantially equivalent to the 99% figure applicable to direct dischargers.

In response to complaints from indirect dischargers and POTWs that the 1978 removal credit provision was "unworkable" and that most POTWs would not apply for credits, this definition of consistent removal was amended in the 1981 rule to provide that the level of removal on which the credit would be based would be that achieved by a POTW 75% of the time. *See* 46 Fed. Reg. 9424 (1981). Seventy-five percent consistency was measured by averaging the lowest six of 12 POTW removal samplings. *Id.*

As noted above, the regulated dischargers still claimed that the removal credit rule was "unworkable," and pressed successfully for a further relaxation of the measurement of consistent removal. The 1984 rule, in fact, provides that "consistent removal is calculated . . . as the difference between the average influent and effluent concentrations in all of the sample data." 49 Fed. Reg. 31215 (1984). Instead of basing its measure of consistent removal on an average of the *lowest six* of the twelve samplings, as the 1981 rule required, the 1984 rule bases its measure on the average amount removed in *all twelve samplings.* According to this formulation, the amount of removal achieved by a POTW *on average,* that is, 50% of the time, will determine the amount of credit an indirect discharger will receive.

In short, EPA first changed the definition of "consistent" removal from its original meaning, i.e. removal that occurs 95% of the time, to a second meaning, i.e. removal that occurs 75% of the time. EPA, then, in its 1984 rule, revised its definition of consistency to refer to removal that occurs only 50% of the time. We find it difficult to fathom how a level of removal that is met one half of the time and exceeded one half of the time, and that contains no limit on the permissible amount of variability, can be termed "consistent."

EPA provides two justifications for the change in the definition of "consistent" removal from 75% consistency to 50% consistency. These justifications are the same ones advanced by EPA in 1981 for its shift from 95% to 75% consistency.

The first justification is that the approach used in the 1978 rule, which based the measure of consistent removal on the lowest of 12 sample removals, is "statistically unsound." Brief for Respondent at 32 (quoting 1981 Final Rule, 46 Fed. Reg. 9424 (1981)). In 1981, in justifying its shift from 95% consistency to 75% consistency, EPA outlined its thinking on this issue with commendable candor. EPA pointed out that using the lowest of the 12 samplings to define consistent removal might easily give rise to error, because "[t]he data at the extremes of this 12 point distribution have the greatest chance of being in error. Thus, if the lowest level of Removal identified were unrepresentatively low, the POTW would be held to an unreasonably small level of Removal."[11] 1981 Final rule, 46 Fed. Reg. 9424. It would be better, EPA said, to estimate the amount removed 75% of the time rather than trying to estimate the amount removed 95% of the time, because the amount removed with 75% consistency could be measured reliably without increasing the number of samplings.

EPA admitted, in 1981, that the choice between 95% consistency and 75% consistency was not a purely technical choice of the one statistically correct method. It stated frankly that it could estimate the amount of removal required to attain 95% consistency, and thus cure the "statistical unsoundness." by increasing the number of annual samplings required of POTWs. The choice of the 75% level was "admittedly a compromise," *id.*, between two policy

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[11] We observe that twelve samplings may give a fairly good idea of how much a POTW removes on average, but they are not enough to give a reliable measure of how much pollutant a POTW removes 95% of the time.

considerations. Because POTWs generally have little incentive to apply for authorization to grant removal credits, EPA was concerned that POTWs would not apply for such authorization if the sampling and reporting requirements imposed upon them were too onerous.[12] On the other hand, EPA was concerned that the rule "ensure that a reasonably consistent level of removal is maintained." 46 Fed. Reg. 9424 (1981).

Even if EPA's reasoning might have justified a change from a 95% to a 75% consistency requirement, that same reasoning cannot justify a change from a 75% to a 50% consistency requirement if such a change violates the command of the statute. That command, as we have repeatedly observed, requires that the amount and variability of toxic discharges through a POTW not exceed those that would be discharged by a direct discharger operating under BAT-level controls.[13] The relevant question is not one of finding

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[12] EPA stated that it "seeks ... to avoid placing more extensive sampling requirements on the POTW." 1981 Final Rule. 46 Fed. Reg. at 9424 (1981). In fact, the complaints of industry commenters regarding the "unworkability" of the 1978 and 1981 versions of the removal credit rule were addressed less to the substantive standards of these rules than to the measurement and reporting requirements that they imposed. *See, e.g.*, Brief for Intervenors Chicago Ass'n. of Commerce and Industry *et al.* (CACI Brief), at 4-5 (Chicago POTW did not apply for credits under earlier version of removal credits provision even though it had achieved compliance with applicable limitations): Letter to EPA from Chemical Manufacturers Association, March 9, 1981 (App. 146) (POTWs will not seek authorization to revise categorical standards even though they are removing high percentages of pollutants).

Of course, EPA may accommodate such objections, but only within the limits set by statute. The removal credit calculation, if it is to embody the necessary controls, will inevitably burden POTWs somewhat. It is up to the indirect discharger, who has a strong incentive to do so, to reach an arrangement with the POTW so that it can obtain the removal credit due it under the Clean Water Act.

[13] The 1981 change from 95% to 75% consistency was never chal-

the one correct method of measuring consistent removal, nor of determining the easiest method of consistent removal, but rather whether a removal credit based on the amount a POTW removes 50% of the time conforms with the requirement of the Act. We are convinced that it does not.

In its brief, EPA makes much of the fact that using all twelve samplings gives "'a more reliable estimate of the *actual removal* achieved than [did] the method employed in the 1981 amendments'." Brief for EPA at 34 (quoting Proposed Rule, 47 Fed. Reg. 42700 (1982) (emphasis added by EPA). EPA's definition may indeed provide a more reliable estimate of the actual removal *on average.* But both the statute and EPA's own previous regulations require that the indirect discharger, in combination with the POTW, meet the same standard as the direct discharger must meet. This means not only that the total *amount* removed by the POTW and the indirect discharger together must be at least equal to that removed by a direct discharger operating under BAT controls, but also that the POTW and the indirect discharger must *consistently* meet the monthly and daily limits that direct dischargers meet.

EPA's second justification for its new definition of consistency is that it gives full effect to Congress' desire to avoid redundant treatment while still complying with the mandate of section 307(b)(1) that the ultimate discharge from the POTW must not be greater than that which would be allowed from a direct discharger.

In its statement of basis and purpose accompanying the 1981 rule, EPA argued that although "[i]n most cases the proposed calculation will indeed result in higher removal

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lenged in the courts. Of course, the fact that NRDC did not challenge a 1981 change that arguably led to some deviation from the statutory requirement does not bar NRDC today from challenging a rule that is clearly in violation of the statute.

allowances and consequently less stringent . . . pretreatment limits," this would not lead to the discharge of "unacceptable amounts of pollutants . . . to navigable waters." 46 Fed. Reg. 9424. EPA explained why, in its view, the change in the definition of consistent removal would not lead to POTW discharges in excess of BAT limits:

> Industrial users are subject to "daily maximum" and "long term average" pretreatment limits. If the Industrial User is to meet the long term average, the User can only infrequently approach the daily maximum number in its daily discharge. For the joint treatment provided by the Industrial User and POTW to be less effective than that required of a direct discharger, a discharge by the User at the daily maximum level would have to coincide with abnormally lower removal at the POTW. The statistical complexities of the situation do not permit a numerical estimate of the number of times this might occur, but EPA expects it to be small. One comment received by EPA on this subject stated that a computer simulation of the problem showed that violations of the daily maximum would occur less than 2% of the time. *This simulation made certain assumptions concerning the statistical distributions which EPA is unable to verify, and EPA did not rely on this result in reaching a decision on the final method of calculation of Consistent Removal.*

1981 Final Rule, 46 Fed. Reg. 9424 (emphasis added). The same explanation is reiterated in EPA's Rebuttal to NRDC's Reply Brief. In essence, EPA's argument rests on the claims that the POTW will rarely perform below its average, that the indirect discharger will virtually never exceed its limit, and that the frequency with which these two events will occur simultaneously is even lower.

EPA is correct in asserting that the indirect discharger will rarely exceed its limit. That limit is set so that it can

be complied with virtually all the time, and this remains true even when the limit is raised to credit the indirect discharger for the POTW's additional removal of pollutants.

But there is no evidence whatsoever to support the claim that the POTW will rarely perform below its average. In fact, this claim is blatantly contradicted by a wealth of evidence in the record, including repeated statements by EPA itself that POTW removal is extremely variable. In 1977, EPA cautioned that "extreme variability in pollutant removals experienced by POTWs" was among the factors to be taken into account in defining an approach to the granting of credits. Proposed Pretreatment Regulations, 42 Fed. Reg. 6485 (1977).

In promulgating the 1981 rule, EPA noted that "industrial pretreatment provides much superior removal of pollutants than does treatment at the POTW." 1981 Final Rule, 46 Fed. Reg. 9406. This is true, EPA said, first, because POTWs are not designed to remove toxic pollutants, and second, because "the dilution [by sewage, other industrial wastes, and, on some days, by rainwater] that occurs at the POTW causes less efficient removal . . . than would be achieved by the Industrial User with its more concentrated waste stream. . . . Partially because removal of toxic pollutants by the POTW is incidental to its normal operations, it is also variable. . . . Removal of toxic pollutants by the POTW will . . . be more variable than removal by treatment technologies designed to remove such toxics." *Id.* at 9406, 9407.

Most recently, in promulgating the 1984 rule, EPA once again emphasized the lack of consistency in POTW removal. 1984 Final Rule, 49 Fed. Reg. 31216. And, in its brief to this court, EPA declares that "the variability of daily removal estimates [for POTWs] may be quite large." Brief for EPA at 35.[14]

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[14] In fact, EPA would have us believe that the variability of POTW

The data from EPA's 1978 study of 40-POTWs provide ample confirmation of the variability of POTW removal. These data clearly reveal that a POTW may remove virtually all of a particular pollutant on day one while removing little or none of that pollutant on day two. *See, e.g., Determining National Removal Credits for Selected Pollutants for Publicly Owned Treatment Works,* EPA 440/2 82-008, at B25-B28 (1982) (showing removal of silver on 6 different days for 16 POTWs). In contrast, most BAT limits provide that the discharge for any one day cannot be more than double the average limit for the month as a whole. *See* 40 C.F.R. pts 405-469 (1984).

The amount of variability (or inconsistency) in POTW removal is particularly important where the removal credit is great. In this situation, most of the removal required in reaching BAT-equivalent levels of treatment will be performed by the POTW, not by the indirect discharger. Thus, the consistency of performance that the indirect discharger achieves in removing the small share of the toxics that it must remove will be relatively unimportant in comparison to the large amount of variability in the POTW's performance in removing the larger share for which it is responsible. *See* NRDC's Reply to EPA's Rebuttal.

It is not at all unusual for removal credits to be in the 80 to 90 percent range. Especially using the method of

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removal is so slight that the daily maximum will rarely be exceeded, while simultaneously arguing that the variability of POTW removal is so great that the 1981 rule must be relaxed. EPA argues that if POTWs are forced to take their *variability* into account, they may be prevented from authorizing credits large enough to fully reflect *average* actual removal. Disregarding the fact that the statute requires compliance with *both* the consistency requirement and the amount requirement, EPA argues that it is justified in ignoring variability. Brief for Respondent at 35-36. Here, as in its argument that the measurement of consistent removal is too difficult, EPA's position is that it should be allowed to avoid the plain command of the statute because compliance with the statute would lead to the granting of fewer removal credits.

calculating consistent removal permitted by the 1984 rule, such large credits are very common for many toxics. *See, e.g.*, applications for removal credit authority from Chicago and Los Angeles County, App. 340-41, 344, 346-48. In such cases, the POTW by itself is responsible for removing between 80% and 90% of the pollutant. When this is so, the variability in the removal performance of the POTW will be almost fully reflected in variability in the final discharge into navigable waters.

As noted above, EPA admitted in 1981 that it had no reliable evidence to support its contention that the joint treatment by the indirect discharger and the POTW operating under a 75% consistency requirement would only rarely exceed the BAT limits that direct dischargers must meet. Yet in 1984, again without presenting any evidence, and in the face of a substantial body of evidence to the contrary collected by EPA itself, including EPA's own assertions, EPA claims that a measure of average removal or (or 50% consistency) will not lead to violations of the variability limits imposed on BAT discharger.

In fact, as we have seen, the evidence on POTW variability in the record shows that the measure of consistent removal under the 1984 rule will frequently allow discharges very substantially above the daily and monthly maxima that BAT dischargers must not exceed. Under EPA's rule, the parity in removals between direct and indirect dischargers that is mandated by the statute is guaranteed, if at all,[15] only over the space of a year.

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[15] Unlike the POTW operating under a 50% consistency requirement, the direct discharger, required to operate under a 99% consistency requirement, cannot offset its bad days against its good days. Because it needs a margin of safety, the direct discharger will operate well within its limits, removing more pollutant than it is required to. As a result, it is likely that even as regards total amount removed over the course of a year, the combined performance of POTW and indirect

If there could be any doubt regarding the fact that EPA's 1984 rule is in derogation of the statute's mandate, it is dispelled by a consideration of the legislative history of the 1977 Act. In enacting the removal credit provision in 1977, Congress had two purposes. Congress' first, and overriding, concern was to ensure that the combined treatment by the indirect discharger and the POTW is equal to that by the direct discharger operating under BAT limits. Secondly, as a subordinate goal, Congress sought to avoid redundant treatment by the indirect discharger and the POTW insofar as this is possible without compromising the primary goal of parity.

The first major water pollution control legislation, the Clean Water Act of 1972, stated in its first section, entitled "Declaration of Goals and Policy," that "it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited." 33 U.S.C. § 1251(a)(3).[16] As we have noted above, Congress's concern with the problem of toxic pollutants led it to strengthen the provisions for dealing with toxics in the 1977 Act. The Conference Report was explicit in stating that "[t]he combination of pre-

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discharger will not equal that of the direct discharger.

EPA argues that if the POTW were required to operate under a 99% (or a 95%) consistency requirement, it would be forced to remove more toxics on average than the BAT discharger, because the POTW's greater variability would require it to set itself a higher level of average removal in order to meet the consistency requirement. Contrary to EPA's assertions, however, such treatment would not be redundant. Indeed, it is necessary if the POTW and the indirect discharger are to comply with the consistency requirements of BAT limitations or standards.

[16] As Representative Roberts, manager of the legislation in the House, said in introducing the conference bill in 1977, the Clean Water Act of 1972 "fully intended that toxics be regulated. They have not only polluted drinking water and destroyed both commercial and sport fishing, but in many major water bodies they also constitute a hazard to aquatic environment and public health that has yet to be fully recognized." Leg.Hist. 327.

treatment and treatment by the municipal treatment works shall achieve *at least* that level of treatment which would be required if the industrial source were making a direct discharge." Leg. Hist. 271 (emphasis added). This point was reiterated by Representative Roberts, the House manager, in presenting the conference bill to the House. Leg. Hist. 343.

The Senate Report suggests that Congress wished removal credits to be granted sparingly. The Report notes that with the exception of a few POTWs specifically designed to treat industrial wastes, POTW treatment of wastes is too variable to allow the assumption of a specific level of removal. Comm. on Environment and Public Works, Clean Water Act of 1977, S. Rep. No. 370, 95th Cong., 1st Sess. 58 (Leg. Hist. 691). The Report also points out that the toxics removed through secondary treatment by a POTW would simply be transferred to the sewage sludge, creating further disposal problems. "In the long run," the Report notes, "the only real solution to the problem of safe disposal of toxic or hazardous industrial pollutants is in their reuse and recycling by industry, not the transfer of such materials from [an] industrial waste stream into municipal waste streams. . . ." *Id.* This can only be accomplished by pretreatment of the pollutants by the industrial discharger. Congress's reasoning suggests that it did not intend the removal credit provision to be interpreted too generously, and it certainly did not intend that provision to be interpreted so as to nullify the protections it was then enacting against toxic pollution.

Finally, the EPA itself has stated that the statute requires that POTW removal be highly consistent before a credit could be granted:

> In order to justify allowing a revision to a categorical pretreatment standard the pollutant removal claimed by a POTW must occur virtually all the time. The EPA believes that a stringent interpretation of "re-

> moval" is warranted in light of the policy of the Act to prohibit the discharge of toxic pollutants in toxic amounts (section 101(a)(3)), and the application of section 307(b)(1) to section 307(a)(1) toxic pollutants.

1978 Final Rule, 43 Fed. Reg. 27765 (1978).

Nothing in the language of the statute or in the legislative history suggests that Congress intended to permit, let alone require, that removal credits be granted when these credits would result in discharges that would violate the daily maximum and monthly average limits under which direct dischargers must operate.

We do not believe that Congress' mandate for the removal of toxic wastes should be subject to exceptions dictated by the convenience of the dischargers. The reason for requiring polluters to meet daily and monthly limits as well as long-term limits is obvious: a single concentrated discharge of a toxic pollutant can do irreparable damage to the ecology of a body of water, killing fish and other life forms. Such excessive toxic discharges cannot be compensated for by a reduced discharge of water during subsequent months.[17] Under EPA's current definition of consistent removal, discharges could be above the limit for months at a stretch, so long as these above-average months were offset by below-average discharges in other months.

We therefore hold that EPA's definition of consistent POTW removal, i.e. removal that is achieved only 50% of the time, violates section 307(b)(1) of the Clean Water Act, 33 U.S.C. 1317(b)(1).

B.

Even had we not held that EPA's 1984 definition of consistent removal violated section 307(b)(1) of the Clean

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[17] As NRDC's attorney put it at oral argument, "It's not much consolation to the beachgoers on a hot day in August to know that the pollution control results for the stream or the ocean were terrific for the months of November to February."

Water Act, we would be obliged to hold that EPA's enactment of the challenged regulation was arbitrary and capricious. According the utmost deference to the Agency, we still cannot find that EPA has given reasons for its new rule that "could lead a reasonable person to make the judgment that the Agency has made." *Weyerhaeuser v. Costle*, F.2d 1011, 1026-27 (D.C. Cir. 1978).

In 1981, when EPA reduced the consistency requirement from 95% to 75%, it acknowledged that this reduction might lead to violations of the required parity between indirect dischargers and POTWs on the one hand and direct dischargers on the other. Yet in 1984, when EPA further reduced the consistency requirement from 75% to 50%, it did not even address the key question of whether its new measure of "consistent" removal will assure such parity. Instead, in a one-sentence explanation of the change, EPA conclusorily stated that its new measure of consistency "provides a more accurate and equitable estimate of the actual removal achieved than the method employed in the 1981 regulation." 1984 Final Rule, 49 Fed. Reg. 31215 (1984). This statement is misleading in that it focuses solely on the amount of removal while ignoring the consistency requirement of the statute. The available evidence, to which we have previously referred, indicates that the parity required by the statute will rarely be achieved under EPA's 1984 rule.

The fact that the Agency has "entirely failed to consider an important aspect of the problem [and has] offered an explanation for its decision that runs counter to the evidence before the agency" renders arbitrary and capricious its decision to change the measure of consistent removal to what is in reality a measure of average removal. *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual*, 463 U.S. 29, 43 (1983). Without regard to Congress's overriding intent that pollutants be eliminated from the nation's waters, without evidentiary support in the record, and without adequate explanation, EPA has *de facto* deleted

the consistency requirement from the removal credit rule. For this reason, without more, we are satisfied that EPA's regulation is arbitrary and capricious under the test set out by the Supreme Court in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual*, 463 U.S. 29, 43 (1983).

IV.

A.

Combined sewers are conduits that transport domestic wastewater, industrial wastewater, and, during periods of wet weather, storm water runoff. Combined sewer systems were built in major American cities before the turn of the century, at a time when the need for separate treatment of wastewater was not yet apparent.[18] POTWs in these systems generally do not have the capacity to deal with the great increase in flow that occurs during rainfall or snowmelt. They therefore have overflow points and treatment plant bypasses to handle the excess flow during such periods. Events of overflow are referred to as "combined sewer overflows" (CSOs). The 1981 removal credit rule contained a provision that adjusted the amount of credit that an indirect discharger could receive so as to take CSOs into account. We conclude that EPA's deletion of this provision from the 1984 rule, without any plausible explanation, violates section 307(b)(1), and in any event is arbitrary and capricious.

The 1978 removal credit rule provided that removal credits could be granted by a POTW that experienced overflow at least once a year only if that POTW was implementing an approved plan to treat and control such overflows. 1978 Final Rule, 43 Fed. Reg. 27765.

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[18] Such systems serve about 1300 municipalities, with a total population of about 38 million, most of whom live in 58 major cities along the upper East coast, in the upper Midwest, and in the far West. *Report to Congress on Control of Combined Sewer Overflow in the United States* 1-2—1-3 (EPA doc.no. 430/9-78-006) (1978).

In response to complaints from indirect dischargers, this provision was modified in the 1981 rule to allow an alternative way for a POTW with overflow problems to grant credits. The POTW could calculate the number of hours per year during which overflow occurs. The removal credit would then be reduced by a percentage equal to the percentage of overflow time during the year. If, for example, overflow occurred during 15% of the year, the removal credit would be reduced by 15%.

In promulgating the 1981 rule, EPA explained that if the regulations are to meet the statutory requirement of parity between treatment by the direct discharger and treatment by the indirect discharger plus POTW,

> it is obvious that the POTW should be credited only with that removal which it actually achieves. Thus, EPA has imposed, through the provisions of [40 C.F.R.] § 403.7, several requirements which ensure that industry standards are relaxed only to the extent that the POTW actually removes the pollutants in question.
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> [Therefore,] the provisions of § 403.7(b) provide that a removal allowance must reflect those periods where industrial pollutant-bearing wastes overflow the POTW and there is, consequently, no actual removal of these pollutants by the POTW.
>
> * * * *
>
> Although some commenters have indicated that the foregoing requirements place unduly burdensome restrictions on the POTW wishing to request a removal allowance, the Agency believes that it has properly interpreted the statute to provide that the POTW will be credited only with that level of removal which is actually and consistently achieved. Support for this interpretation is found in the conference report ac-

> companying the Clean Water Act and in the House debate on the Conference Report [as well as in the Senate debate on the Conference Report].

1981 Final Rule, 46 Fed. Reg. 9423.

Notwithstanding its own interpretation of the statutory requirement, EPA resorted to what it termed a "justifiable compromise" that went beyond giving credit for toxic waste which is actually and consistently removed. 46 Fed. Reg. 9426. In fact, adjusting the credit granted to the indirect discharger by the percentage of time that overflows occur does not take into account the fact that CSOs cause sudden increases in pollutant discharges into navigable waters. "[An] important characteristic of CSO . . . is the intermittent nature of the discharge. . . . The impact of a large combined sewer overflow event on any viable aquatic biota element in the receiving water can be extremely detrimental." *Report to Congress on Control of Combined Sewer Overflow, supra*, at ES-4.[19] A strict interpretation of the statute would, therefore, need to take into account the POTW's performance *during* an overflow. However, here, as with the definition of consistent removal, the Agency was concerned not to adopt an approach that would be "unduly burdensome for POTWs to implement," or that would reduce too greatly the number of POTWs able to grant removal credits to their industrial dischargers. 46 Fed. Reg. 9246.[20]

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[19] The impact on receiving waters is augmented by the fact that pollutants are "resuspended" during CSO events. During dry weather, the sluggish flow through the sewage pipes leads to the sedimentation of some pollutants, which collect in the pipes. During rainy periods, the velocity of water flowing through the pipes "resuspends" these pollutants, and a part of them pass completely untreated into navigable waters.

[20] EPA's 1981 discussion of CSOs characterized the compromise CSO adjustment factor in the 1981 rule as providing for an "average consistent removal level." 46 Fed. Reg. 9426. According to the Agency,

Although the 1981 CSO provision was a relaxation of the 1978 rule, and an admitted compromise, it was challenged by industry petitioners in this court. *National Association of Metal Finishers v. EPA*, 719 F.2d 624 (3d Cir. 1983) (NAMF). The petitioners argued that "POTWs will be unable to make verifiable engineering estimates of the hours of overflow, and will thus be unable to grant removal credits." *NAMF*, 719 F.2d at 649.[21] This court, upholding the CSO provision, responded that "section 403.7(b) simply implements the statutory requirement that removal credits be granted only for pollutants actually removed by the POTW. Moreover a POTW unable to estimate the time, let alone the amount, of untreated wastewater overflow may not be able to accurately predict the proportion of pollutants which it will remove." *Id.*

In 1982, EPA proposed a further relaxation: it would entirely eliminate the overflow compensation requirement from the calculation of removal credits, on the ground that "the overflow adjustment makes a negligible difference in the final removal credit." 1982 Proposed Rule, 47 Fed. Reg. 42701. It based its conclusion on a 1978 study of 15 POTWs. *See Report to Congress on Control of Combined Sewer Overflow, supra,* ch. 6 *passim.* "Relying on frequency modeling of the rainfall characteristics of [10 of the 15] sites, the report found that combined sewers will overflow an average of 7.3% of the time." 1982 Proposed

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this is a level of removal computed by taking into account "both those periods of high removal and those periods of low or zero removal." As with the definition of consistent removal discussed in part III above, here too it remains puzzling, to say the least, that removal which is high at some times and zero at others can be termed consistent. EPA's penchant for looking solely at long-term effect spreads the quantitative impact of an overflow over many days when there are no overflows, thus understating the true impact of the inconsistency in treatment.

[21] In order to simplify the POTWs' task, EPA had already permitted them to substitute "a verifiable engineering estimate of the annual hours of Overflow where actual monitoring of Overflow points is infeasible." 1981 Final Rule, 46 Fed. Reg. 9427.

Rule, 47 Fed. Reg. 42701. A 7.3% adjustment in the removal credit, EPA stated, will led [sic] to a negligible adjustment in the discharge limit the indirect discharger is required to meet.[22] The 1984 rule did in fact eliminate the CSO provision.

B.

The deletion of the CSO provision violates section 307(b)(1) of the Clean Water [Act] in two respects. First, EPA may not base removal credits on a purported average figure for the frequency of CSOs. To do so ignores the great variability among POTWs in the number and duration of CSO events and in the amount of bypass that occurs during such events. For many POTWs, overflow would require an adjustment of substantially more than 7.3%.

Second the statute does not permit EPA to raise pollutant discharge limits for indirect dischargers by 7.3%, or by any amount that is not *de minimis*, over those that are required of direct dischargers simply because it feels that an increase in pollutant discharge is not very large. This violates the requirement that treatment by indirect dischargers plus POTWs must equal that by the direct discharger, because it permits the indirect discharger and the POTW to discharge a greater total *amount* of pollutants, and because it permits POTWs and indirect dischargers to discharge waste that is largely untreated, in complete disregard of any requirement of *consistency*.

The type of average measure relied upon by EPA in deciding to delete the CSO provision is similar to the na-

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[22] In addition to the argument based on the "negligible" total number of hours per year of CSOs, EPA relied on an analysis of the amount of pollutants that escape treatment during CSO events at eight sites in four cities. *Combined Sewer Overflow Toxic Pollutant Study*, (EPA doc. no. 440/1-84/304) (1984). "This analysis indicated that, on average, eight percent of metals bypassed the POTW and were thus not treated." 1984 Final Rule, 49 Fed. Reg. 31220.

tional removal rate measure proposed (in 1982) and subsequently rejected (in 1984) by the Agency as a method of determining how much credit to grant to indirect dischargers. According to EPA's 1982 proposal, a national removal rate for each pollutant was to have been set at the level which was met by roughly 75% of 40 POTWs studied by EPA. 1982 Proposed Rules, 47 Fed. Reg. 42699-700.

In rejecting the national removal credit proposal as proposed in 1982, EPA stated:

> The Agency has concluded, upon reconsideration, that Congress intended that a removal credit be granted for a particular pollutant only to the extent that a particular POTW can demonstrate that it removes the pollutant. The language of the statute, buttressed by the legislative history, indicates that removal credits are to be based upon case-by-case removal determinations, rather than upon a nationally determined rate.

1984 Final Rule, 49 Fed. Reg. 31212-13.

EPA correctly relied on the language of section 307(b)(1) of the Clean Water Act, on the legislative history of the 1977 Act, and on this court's holding in *NAMF*, 719 F.2d 624, to conclude that the enormous variability of removal performance among POTWs made the use of an average removal figure unlawful.

For the very same reasons, EPA's reliance on an average rate of "removal," i.e. of overflow, cannot support its deletion of the CSO adjustment in the 1984 rule. If EPA concedes, as it does, that removal rates for individual POTWs cannot be determined on the basis of a national sample; it is difficult to see how the duration and importance of CSO events at individual POTWs can be determined on the basis of two studies of a smaller number of POTWs, (one of ten POTWs, the other of eight POTWs)

neither of which can be deemed representative of the entire universe of 1300 municipalities.[23]

By using an average 7.3% figure for overflows, EPA fails to take into account that in some cities the percentage of time in which overflows occur is substantially greater. In Philadelphia, for example, overflows occur at nearly double the average rate. Chicago's 1984 application for authority to grant removal credits, included in the record in this case, states that in two typical pumping stations, overflows occurred 10.9% of the time. *See* Request of Authority to Revise Categorical Pretreatment Standards 25 (Metropolitan Sanitary District of Greater Chicago, 1984)(App. 343).

In addition to ignoring variability in the frequency and duration of CSOs, EPA also bases its decision on the asserted "insignificance" of a 7.3% adjustment in the discharge limit applicable to indirect dischargers. It seems

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[23] The 8-POTW study is not even mentioned in the statement of basis and purpose accompanying the rule. In any case, the data from the very small samples of POTWs that EPA has studied indicate that combined sewer systems vary widely in the duration of their overflows and in the mass of metals that bypass the POTW during overflow events. EPA appears to have relied exclusively on data from the 10 POTWs in concluding that combined sewers overflow on average 7.3% of the time. Yet these data show enormous variability from city to city. In Sacramento, the computer simulation indicated that overflow would occur 3.2% of the time, whereas in Philadelphia it indicated that overflow would occur 13% of the time. *See* The Elimination of By-Pass Factors in the Removal Credit Package (EPA internal memorandum, Aug. 4, 1982) (App. 271). The 8 POTWs studied in the 1984 study show similar variability, both in duration and in the percentage of metals that bypass the POTW. *See* Effect of CSO's on Removal Credits, Table 3 (EPA memorandum to the record, Jan. 9, 1984).

The amount of overflow depends not only on the amount and intensity of rainfall at the city in question, but also on factors such as the design of the POTW and the system channelling wastewater into the POTW. *Combined Sewer Overflow Toxic Pollutant Study* 56 (EPA doc. no. 440/1-84/304, 1984).

obvious that a 7.3% difference in the total amount of pollutant discharged into navigable waters over the long term is not *de minimis*. As NRDC points out, EPA has in the past deemed relatively small changes sufficient to warrant promulgating new rules. For example, the Agency promulgated new pretreatment standards for electroplaters for nickel, even though the new limits were only 3% to 8% more stringent than the old ones. *Compare* 46 Fed. Reg. 9472 (1981) *with* 48 Fed. Reg. 32487 (1983). Likewise, in its iron and steel standards, EPA gave merchant coke plants different daily and monthly direct discharge effluent limits only 7% less stringent than those for other coke-making plants. 47 Fed. Reg. 23287.

Adopting EPA's data and analysis, NRDC concludes that as a result of CSOs, indirect dischargers dispose of 560,000 additional pounds of toxics a year directly into the nation's waters. Reply Brief for NRDC at 14-15. This figure exceeds the total volume of toxics currently discharged into POTWs by eight industrial categories which EPA has nevertheless seen fit to regulate. *See Assessment of the Impacts of Industrial Discharges on Publicly Owned Treatment Works* Table 1-3 (1981) (Report prepared for EPA by JRB Associates). We need not, however, rely on this illustrative calculation to understand that combined sewer overflow is a major environmental hazard, and has been viewed as such not only by EPA, but by Congress as well. *See* section 416(c) of the Clean Water Act, 33 U.S.C. § 1375(c) (requiring the Administrator of EPA to submit report on CSO to Congress); *see also* comments of House manager Rep. Roberts, Leg. Hist. 357 ("Combined sewer overflow is a serious pollution problem which must be addressed in order to meet the enforceable requirements of the Act.")

We therefore hold that a removal credit regulation that permits indirect dischargers and their POTWs to ignore CSOs, and thus to exceed the limits applicable to direct dischargers by 7.3% on average, and by at least 13% in

some cities, is in violation of section 307(b)(1) of the Clean Water Act, 33 U.S.C. § 1317(b)(1).

C.

EPA has failed to provide any plausible reason for deleting the CSO requirement. Nor has it provided any explanation for, or evidence supporting, a 7.3% average increase in pollutant discharges, and a discharge increase of 13% or more in certain cities. Nevertheless, it has proceeded to eliminate the CSO provision.

Neither the 1978 report on which EPA relied in its initial proposal nor the 1984 report which EPA uses to buttress this proposal even addresses the question of environmental effects. Furthermore, at the time when EPA proposed to delete the CSO provision, it cited no data whatsoever in support of its decision beyond what had been available to it when it promulgated the 1981 rule.

Even if it were admitted, which it cannot be, that deletion of the CSO adjustment would have little significant detrimental impact on the environment, the Agency has provided no explanation of why the adjustment should be deleted except to say that POTWs have difficulty measuring their CSOs. This might at most argue for the use of an average figure, but it certainly cannot provide support for deleting the adjustment entirely.

Thus, in addition to violating section 307(b)(1), the Agency's deletion of the CSO adjustment without any rational justification, and without any discussion of the environmental effects that will result, must be deemed arbitrary and capricious.

V.

The 1984 rule changed the test for determining when a removal credit has to be modified or withdrawn. Instead of acting whenever the POTW no longer fulfills the con-

ditions justifying a credit, EPA will, under its 1984 rule, withdraw a credit before the expiration of the POTW's five-year permit only if the POTW's removal rate drops "consistently and substantially" below the rate claimed in its permit application. 1984 Final Rule, 49 Fed. Reg. 31224. We agree with NRDC that the new test violates the Clean Water Act.[24]

EPA's 1978 version of the rule had simply stated that "EPA or the NPDES State[25] can withdraw [a POTW's] authorization [to grant credits] . . . upon 60 days notice of continued violation." 1978 Final Rule, 43 Fed. Reg. 27766. Later, in the 1981 version of the rule, EPA expanded upon this statement in section 403.7(f)(5). This section provided that, following notice to the POTW of a violation,

> If appropriate corrective action is not taken within a reasonable time, not to exceed 60 days unless the POTW or the affected Industrial Users demonstrate that a longer time period is reasonably necessary to

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[24] NRDC also argues that the Agency violated the Administrative Procedure Act by failing to give notice of the change in its proposed rule and by making the change without having any evidentiary basis in the record for doing so. We agree with EPA that EPA's proposal was sufficient to apprise interested parties of the subjects and issues to be addressed by the Agency in the final rule. *See* American Iron and Steel Institute v. EPA, 568 F.2d 284, 293 (3d Cir. 1977); Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977). We also agree with EPA that this change would not require any empirical support if it were within the area of discretion that the statute left open to Agency policy-making. *See, e.g.*, Chevron, U.S.A., Inc. v. NRDC, 104 S. Ct. 2778, 2793 (1984) ("an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments").

[25] The NPDES state is the state issuing the POTW's permit under the National Pollutant Discharge Elimination System, through which, under section 402 of the Clean Water Act, 33 U.S.C. § 1342, the EPA and the states issue permits to dischargers, including POTWs. Such permits are issued for five-year periods.

> undertake the appropriate corrective action, the Approval Authority shall either withdraw such discharge limits or require modifications in the revised discharge limits [i.e. in the removal credit].

1981 Final Rule, 46 Fed. Reg. 9447.

Under the 1981 rule, action by the Approval Authority or by EPA was triggered by a determination "that such discharge limit revisions [i.e., removal credits] are causing or significantly contributing to a violation of any conditions or limits contained in the POTW's NPDES Permit." *Id.* For the definition of when a removal credit "significantly contributes to a violation," the rule referred to subsections 403.3(i) and (n) of the General Pretreatment Regulations, 40 C.F.R. 403.3(i) and (n) (1982), which define when an indirect discharger "significantly contributes" to a POTW permit violation. 1981 Final Rule, 46 Fed. Reg. 9439-40. Subsections 403.3(i) and (n) define any discharge in excess of permitted amounts as significant.

In *NAMF*, 719 F.2d 624, this provision of the 1981 removal credit rule was attacked by industry petitioners as unworkable: "Joint petitioners say that due to section 403.7(f)(5) they will be unable to rely on their removal-revised discharge limits and will be forced to install just as much control technology as if there were no removal [by the POTW] at all." *NAMF*, 719 F.2d at 649. This court responded: "We agree with EPA . . . that such withdrawn or modified discharge limits, though unfortunate, are merely the recognition of the POTW's failure to remove the pollutant." *Id.*

In spite of this court's approval of the 1981 provision, in 1982 EPA proposed to amend section 403.7(f) to give the POTW six months to return to compliance after the initial violation. The proposal provided further that, "The Approval Authority can . . . extend the time for compliance for up to one year if the POTW demonstrates good faith

efforts to return to compliance." 47 Fed. Reg. 42703. NRDC, in its comments on the proposed rule, challenged the legality of this extended tolerance of POTW violations. In promulgating the 1984 final rule, the Agency responded that it "agrees that the proposed procedure . . . provided too much latitude to a POTW which is experiencing problems," and it deleted the proposed change. 1984 Final Rule, 49 Fed. Reg. 31220.

However, EPA found another route to the same goal: it amended the test that determined when action by the Approval Authority or by EPA will be triggered. Under the 1984 rule, "the removal credits will generally remain set for the [five-year] term [of] the POTW's NPDES permit." 49 Fed. Reg. 31216. The removal credits can be modified or withdrawn during the permit term only if "the POTW's consistent removal rate is *consistently* and *substantially* lower than the removal credit specified in the POTW's NPDES permit." 1984 Final Rule, 49 Fed. Reg. 31224.

With this change, EPA has relaxed both the consistency and the amount of removal of pollutants required of POTWs and indirect dischargers. Under this test, even *grossly inconsistent* removal will not be sufficient cause for withdrawal of a credit; and even removal *substantially below* the required amount will not be sufficient cause for withdrawal of a credit. Only when *both* these violations occur can a credit be withdrawn before the expiration of a POTW's permit. After the credit is withdrawn, the indirect discharger may, in certain cases, have up to three more years to install the required treatment systems. *See* 40 C.F.R. §§ 403.7(f)(4)(iii) & 403.6(b) (1985). Thus, a violation of the BAT-equivalent limits required by section 307(b)(1) of the Clean Water Act, 33 U.S.C. § 1317(b)(1), may continue for up to eight years before the Agency's rules permit it to act against the violators.

EPA conceded that its proposal, made in 1982, to delay for up to 12 months the initiation of credit withdrawal procedures against a POTW that is in violation of its discharge limits would have "provided too much latitude to a POTW which is experiencing problems," even as applied to a POTW that was only slightly in violation of these limits. 49 Fed. Reg. 31220. Yet after deleting the change proposed in 1982, EPA in 1984 substituted a provision that allows a potential of up to eight years of violative discharges.

We note once again that the BAT limits are set so that, applying available technology, they can be met with 99% consistency. Removal credits must also be set so that they can be met consistently. The Clean Water Act forbids POTWs and indirect dischargers to exceed BAT-equivalent limits for substantial periods of time. Yet EPA's 1984 rule, in permitting precisely this, is in contravention of section 307 (b)(1) of the Clean Water Act.

VI.

A.

Virtually all of the toxics that do not pass untreated through the POTW become concentrated in the sludge. The "removal" of non-biodegradable toxics, such as metals, from the wastes that flow into the POTW transfers these toxics from the POTW's liquid wastestream to the POTW's solid waste, i.e. to the sludge. *See* 1981 Final Rule, 46 Fed. Reg. 9408. For example, EPA has found that 28 of the 129 priority pollutants listed in the toxics consent decree, *NRDC v. Train,* 8 Env't Rep. Cas. (BNA) 2120, although not detected in POTW influents, had become concentrated in sufficient amounts to be detectable in POTW sludge. *The Fate of Priority Pollutants in Publicly Owned Treatment Works* 70-71 (EPA doc. no. 440/1-82/303) (1982).

Contamination of POTW sludge with toxics creates numerous problems. It makes disposal by municipalities ex-

pensive and difficult. It may prevent productive uses of sludge, for example as fertilizer or soil conditioner, or it may introduce toxics into the food chain, where they become further concentrated. Toxics from landfills may leach into groundwater and contaminate drinking supplies. If incinerated, toxics can poison the atmosphere, harming POTW workers and surrounding communities. As EPA has noted, "It is therefore desirable to isolate these *toxic* pollutants in small, but concentrated, industrial sludges, rather than sending them on to the larger POTW sludge." 1981 Final Rule, 46 Fed. Reg. 9410.

This can only be done through pretreatment by the discharger. Pretreatment has other advantages as well. Toxics can be treated more efficiently when they are more concentrated and when the treatment can be designed for the specific pollutants involved. In some cases, the industry can apply technologies to recover and recycle valuable metals and organic toxics which could not be applied at the POTW.

With these considerations in mind, Congress in 1977 added subsection 405(d) to the Clean Water Act. This subsection provides as follows:

> The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish, within one year after December 27, 1977, and from time to time thereafter, regulations providing guidelines for disposal of sludge and the utilization of sludge for various purposes. Such regulations shall—(1) identify uses for sludge, including disposal; (2) specify factors to be taken into account in determining the measures and practices applicable to each such use or disposal (including publication of information on costs); (3) identify concentrations of pollutants which interfere with such use or disposal.

33 U.S.C. § 1345(d).

At the same time, Congress amended section 307(b)(1) of the Act to condition the granting of removal credits upon POTW compliance with subsection 405(d). Such credits may be authorized only if they do not "prevent sludge use or disposal by such works in accordance with section 405 of this Act." 33 U.S.C. § 1317(b)(1).

The 1984 removal credit rule purports to satisfy these statutory requirements by providing that credits will not be granted unless "[t]he granting of [such] removal credits will not cause the POTW to violate the local, State and Federal Sludge Requirements which apply to the sludge management method chosen by the POTW." 40 C.F.R. § 403.7(a)(3)(iv) (1985). The rule proceeds to define federal sludge requirements by reference to regulations issued under other environmental statutes. 40 C.F.R. § 403.7(a)(1)(ii) (1985).

B.

EPA argues that NRDC's challenge to this portion of the removal credit rule is time-barred. Section 509(b)(1) of the Clean Water Act provides that a petitioner may obtain review of such a rule if a petition is filed "within ninety days from the date of . . . promulgation, . . . or after such date only if such application is based solely on grounds which arose after such ninetieth day." 33 U.S.C. § 1369(b)(1). EPA argues that because the sludge regulations have remained unchanged "for the past six years," they cannot be challenged in this court now. Brief for EPA at 21.

This argument is not persuasive. First, the 1984 rule differs from its predecessor rules, both in its sludge provisions and in other significant features which affect sludge contamination. Second, regardless of any differences between the 1984 rule and earlier rules, EPA submitted the entire 1984 rule for public comment.

Third, we are empowered to entertain NRDC's claim because NRDC bases its argument on "grounds which arose after [the] ninetieth day" following promulgation of earlier removal credit rules, as provided by 33 U.S.C. § 1369(b)(1). EPA's sludge regulations were already overdue in 1979, when EPA called for comments on the 1981 rule, but at that time EPA was only one year beyond the statutory deadline, and the sludge regulations were said to be close to proposal. Yet as of October, 1985 the Federal Register revealed that the section 405(d) regulations had yet to be proposed, let alone promulgated. A final rule is now promised for July, 1987. Current and Projected Rulemakings, 50 Fed. Reg. 44672 (1985).

For these reasons, we hold that EPA's failure to promulgate these regulations and the others required by section 405 as a precondition to the granting of removal credits defeats its contention that NRDC is time-barred in its challenge.

C.

NRDC argues that the removal credit rule, as it pertains to sludge, is in violation of the statute because no regulations under section 405(d) have been promulgated by EPA. As a consequence, NRDC argues, no removal credits can be authorized. NRDC rejects EPA's contention that the regulations which have been issued under other environmental statutes constitute section 405(d) regulations, claiming that such a "grab-bag" of regulations cannot constitute the comprehensive framework of sludge regulations required by Congress in sections 405(d) and 307(b)(1). EPA, on the other hand, asserts that its rule, by incorporating regulations issued under other environmental statutes, meets the requirement of section 405(d) that "the Administrator . . . shall develop and publish . . . regulations providing guidelines for the disposal [and utilization] of sludge. . . ." 33 U.S.C. § 1345(d). EPA argues that because

such sludge regulations exist, removal credits may be authorized under section 307(b)(1).

Section 405 sludge regulations must "specify factors to be taken into account in determining the measures and practices applicable to each" method of utilization or disposal of sludge, and "identify concentrations of pollutants which interfere with such use or disposal." 33 U.S.C. § 1345(d). According to a report prepared for EPA, the major methods of sludge disposal are landfill (51% of total tonnage), incineration (31%), land spread (8%) and ocean dumping (11%). *Assessment of the Impact of Industrial Discharges on Publicly Owned Treatment Works* I:10 (1981) (report prepared for EPA by JRB Associates). For each of these methods, EPA must set limits of concentration for each of the priority pollutants found in POTW sludge. EPA's 40-POTW study found that over 100 of the 129 priority pollutants are to be found in sludge. Forty of these were detected in at least 10% of the samples, and 24 of these were detected in at least 50% of the samples. *Id.* at B54.

A number of regulations issued under other statutes do affect aspects of sludge disposal, and they are referenced by the removal credit rule. In promulgating the 1981 rule, EPA stated that "the section 405 regulations will, to a large degree, simply reference the existing requirements." 46 Fed. Reg. 9428. However, this regulatory patchwork, sewn together from pieces of regulations authorized by other statutes, is able to protect against only a few of the most extreme environmental consequences of sludge contamination. We agree with NRDC that the regulations referenced in the current rule, which are if anything fewer than those listed in the 1981 rule,[26] do not, nor were they intended to, provide the comprehensive standards for

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[26] The 1981 rule referenced the regulations on distribution and marketing of sludge products, which were listed as forthcoming. There is no mention of these regulations in the 1984 rule.

sludge disposal intended by section 405(d). They leave many aspects of sludge disposal completely unregulated.

For example, EPA has defined safe limits for two toxics, cadmium and PCBs, but only when they are landfilled or land spread. Mercury limits are defined only for incineration. Landfill regulations issued under the Resources Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*, specify impermissible concentrations of certain metals in ground water, but they do not specify such concentrations for sludge. Distribution and marketing regulations, which were in the preproposal draft stage in May of 1980 but which have still not been proposed, would, according to EPA, provide additional limits on cadmium and PCBs, as well as restrictions on toxic metals in sludge products. 1981 Final Rule, 46 Fed. Reg. 9428. Certainly, the existing regulations do nothing to advance the congressional goal of making sludge into a productive asset rather than a toxic liability.

Not only do we reject EPA's argument that it may refer to other regulations in order to satisfy its statutory obligation to enact sludge rules, but EPA's position is belied by letters from EPA's Administrator to the chairman of the Senate Oversight Committee. On June 28, 1983, EPA Administrator Ruckelshaus, in response to a letter of inquiry from Senator Robert Stafford, Chairman of the Committee on Environment and Public Works, wrote:

> I believe that I can, however, commit at this time to promulgating within two years a basic regulation which will establish the programmatic framework for sludge management, list the significant pollutants found in sludge, list sludge uses, and specify factors to be taken into account in determining measures and practices to be applied to the various sludge uses and disposal practices, and issue concentration criteria for those key pollutants for which we now have adequate scientific information to develop regulatory standards.

Letter from Administrator Ruckelshaus to Senator Stafford, June 28, 1983 (App. 349).

Nearly a year later, Administrator Ruckelshaus again reported to Senator Stafford as follows:

> We are well underway in our work on several aspects of the technical regulations required by section 405 of the Clean Water Act. I know that these regulations are of special concern to you. We have identified more than 30 pollutants found in sludge that are of initial concern, and we have identified the sludge uses we will regulate. We have begun to assemble the background data and documentation for the regulatory record.

Letter from Administrator Ruckelshaus to Senator Stafford, May 22, 1984 (App. 352). These letters clearly recognize EPA's failure to promulgate the section 405 rules.

We hold that despite EPA's contention that sludge regulations are in place, EPA's device of incorporating other regulations does not meet the statute's command for a comprehensive framework to regulate the disposal and utilization of sludge, and that EPA cannot, in the absence of the section 405 regulations, authorize the issuance of removal credits under section 307(b)(1).

VII.

The Village of Sauget, Illinois operates a POTW that treats waste from nine industrial users, which waste accounts for 98% to 99% of the POTW influent. Cerro Copper is one of the indirect dischargers using the Sauget POTW. Sauget and Cerro challenge EPA's removal credit formula and complain that the Agency has failed to respond publicly to their comments and has failed to take into account the uniqueness of their situation.

These petitioners presented exactly the same substantive issues in a petition filed in the Seventh Circuit challenging

the 1981 removal credit rule and EPA's 1983 pretreatment standards for the copper-forming industry, 40 C.F.R. pt. 468 (1984). The Seventh Circuit "summarily dispose[d]" of the petitioners' attack on the national pretreatment standards for the copper-forming industry, pointing out that EPA's rulemaking was not addressed to the situations of individual POTWs and that the statute clearly intended that the rules should be national in scope. *Cerro Copper Products Co. and Village of Sauget v. Ruckelshaus*, 766 F.2d 1060,1067 (7th Cir. 1985). As to Cerro and Sauget's challenge to the removal credit rule, the court stated that it was without jurisdiction to entertain a challenge to a 1981 rule in a petition filed in November, 1983. *Id.* at 1069.

Possibly anticipating the Seventh Circuit's response to their challenge to the 1981 removal credit rule, on November 16, 1984, Cerro and Sauget filed a timely petition for review in the Seventh Circuit challenging the *1984* rule. In an order dated January 7, 1985, the Seventh Circuit transferred this petition here, where it was consolidated with the previously filed petition of NRDC.

For the reasons discussed in part VI above, we reject EPA's contention that Cerro and Sauget's challenge to the removal credit rule is barred because it regards an aspect of the rule that remains basically unchanged from the 1981 rule. However, we find no merit in Cerro and Sauget's procedural and substantive challenges.

First, we observe that EPA is not required to answer publicly every comment, no matter how frivolous, but only to comment on major issues that are central to the exercise of its regulatory discretion. *Action on Smoking and Health v. C.A.B.*, 699 F.2d 1209, 1216 (D.C. Cir. 1983) (agency must address major comments); *American Standard, Inc. v. United States*, 602 F.2d 256, 269 (Ct.Cl. 1979) (purpose of statement of basis and purpose is to enable reviewing court to exercise its function); *National Nutri-*

tional Foods Association v. Weinberger, 512 F.2d 688, 701 (2d Cir. 1975) (same). Cerro and Sauget's claim that their situation is "unique" hardly presents a major issue. EPA responded by letter to petitioners' claim several times. On the issue of removal credits, the Agency responded twice, once on December 8, 1982, and again, in much more detail, on June 15, 1984. *See* App. 326-27, 328-36.

Cerro and Sauget's argument boils down to nothing more than a claim that EPA's rule violates the intent of section 307(b)(1) because it does not exempt Cerro from the pretreatment requirements. They argue that the treatment of Cerro's wastes by the Sauget POTW is "adequate," so EPA's formula must be faulty. However, it is Cerro and Sauget's proposed method of calculating pollutant removal that is flawed. It amounts to nothing more than seeking removal credit for dilution of pollutants, a "solution" that Congress has explicitly ruled out. Leg. Hist. at 691. *See also* 40 C.F.R. § 403.6(d). EPA has simply concluded, based on the information provided to it by Cerro and Sauget, that the Sauget POTW's current waste removal does not meet the standards set by EPA.

Cerro and Sauget argue further that the treatment provided by the Sauget POTW will, in a year's time, be augmented by the treatment provided at a regional POTW now under construction. That POTW will receive wastes from the Sauget POTW and treat them further before discharging them into navigable waters. Cerro and Sauget claim that EPA must consider the joint operation of the two POTWs in calculating the removal credit due Cerro.

This is an issue regarding the implementation of the removal credit rule, and is therefore not one that is properly addressed here. If Cerro and Sauget disagree with EPA's appplication of the rule to them, they will be able to challenge this application in court.[27] *See Bethlehem Steel*

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[27] We note that EPA does not disagree with petitioners' interpre-

Corp. v. Gorsuch, 742 F.2d 1028, 1033 (7th Cir. 1984); *Tanners' Council of America, Inc. v. Train*, 540 F.2d 1188, 1196 (4th Cir. 1976). Their present demand for a promise of exemption on the basis of hypothetical treatments by an as yet uncompleted POTW is premature and irrelevant to the national removal credit rule.

VIII.

We have concluded that EPA's 1984 removal credit rule fails to meet the requirements mandated by statute. We will therefore grant NRDC's petition for review at No. 84-3530.

The petition of Cerro Copper and the Village of Sauget at No. 85-3012 will be denied.

APPENDIX

Exhibit A

Section 307(b)(1) of the Clean Water Act, 33 U.S.C. § 1317(b)(1), provides as follows:

> The Administrator shall, within one hundred and eighty days after October 18, 1972, and from time to time thereafter, publish proposed regulations establishing pretreatment standards for introduction of pollutants into treatment works (as defined in section 1292 of this title) which are publicly owned for those pollutants which are determined not to be susceptible

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tation, but simply states that it will consider their case when they are able to produce the relevant data. As EPA has told petitioners, "Once this information [on the removal efficiency of the as-yet-uncompleted regional POTW] is available, the need for pretreatment at the industries may be eliminated through application of removal credits, if the combined treatment of the facilities at Sauget and [the regional POTW] sufficiently removes the pollutants. . . ." Letter from Bruce R. Barrett, Director, Office of Water Enforcement and Permits, EPA, to Richard J. Kissel, Esq., December 8, 1982 (App. 326).

to treatment by such treatment works or which would interfere with the operation of such treatment works. Not later than ninety days after such publication, and after opportunity for public hearing, the Administrator shall promulgate such pretreatment standards. Pretreatment standards under this subsection shall specify a time for compliance not to exceed three years from the date of promulgation and shall be established to prevent the discharge of any pollutant through treatment works (as defined in section 1292 of this title) which are publicly owned, which pollutant interferes with, passes through, or otherwise is incompatible with such works. If, in the case of any toxic pollutant under subsection (a) of this section introduced by a source into a publicly owned treatment works, the treatment by such works removes all or any part of such toxic pollutant and the discharge from such works does not violate that effluent limitation or standard which would be applicable to such toxic pollutant if it were discharged by such source other than through a publicly owned treatment works, and does not prevent sludge use or disposal by such works in accordance with section 1345 of this title, then the pretreatment requirements for the sources actually discharging such toxic pollutant into such publicly owned treatment works may be revised by the owner or operator of such works to reflect the removal of such toxic pollutant by such works.

Exhibit B

Section 405(d) of the Clean Water Act, 33 U.S.C. § 1345(d), provides as follows:

The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish, within one year after December 27, 1977, and from time to time there-

after, regulations providing guidelines for the disposal of sludge and the utilization of sludge for various purposes. Such regulations shall—

(1) identify uses for sludge, including disposal;

(2) specify factors to be taken into account in determining the measures and practices applicable to each such use or disposal (including publication of information on costs);

(3) identify concentrations of pollutants which interfere with each such use or disposal.

The Administrator is authorized to revise any regulation issued under this subsection.

Exhibit C

The 1984 removal credit rule, 49 Fed. Reg. 31212 (1984) (codified at § 403.7 (1985)) provides as follows:

§ 403.7 Removal credits.

(a) *Introduction*—(1) *Definitions.* For the purpose of this section:

(i) "Removal" means a reduction in the amount of a pollutant in the POTW's effluent or alteration of the nature of a pollutant during treatment at the POTW. The reduction or alteration can be obtained by physical, chemical or biological means and may be the result of specifically designed POTW capabilities or may be incidental to the operation of the treatment system. Removal as used in this subpart shall not mean dilution of a pollutant in the POTW.

(ii) "Sludge Requirements" shall mean the following statutory provisions and regulations or permits issued thereunder (or more stringent State or local regulations): section 405 of the Clean Water Act; the Solid Waste Disposal Act (SWDA) (including Title II more

commonly referred to as the Resource Conservation Recovery Act (RCRA) and State regulations contained in any State sludge management plan prepared pursuant to Subtitle D of SWDA); the Clean Air Act; the Toxic Substances Control Act; and the Marine Protection, Research and Sanctuaries Act.

(2) *General.* Any POTW receiving wastes from an Industrial User to which a categorical Pretreatment Standard(s) applies may, at its discretion and subject to the conditions of this section, grant removal credits to reflect removal by the POTW of pollutants specified in the categorical Pretreatment Standard(s). The POTW may grant a removal credit equal to or, at its discretion, less than its consistent removal rate. Upon being granted a removal credit, each affected Industrial User shall calculate its revised discharge limits in accordance with subparagraph (4) of this paragraph. Removal credits may only be given for indicator or surrogate pollutants regulated in a categorical Pretreatment Standard if the categorical Pretreatment Standard so specifies.

(3) *Conditions for authorization to give removal credits.* A POTW is authorized to give removal credits only if the following conditions are met:

(i) *Application.* The POTW applies for, and receives, authorization from the Approval Authority to give a removal credit in accordance with the requirements and procedures specified in paragraph (e) of this section.

(ii) *Consistent removal determination.* The POTW demonstrates and continues to achieve consistent removal of the pollutant in accordance with paragraph (b) of this section.

(iii) *POTW local pretreatment program.* The POTW has an approved pretreatment program in accordance with and to the extent required by Part 403; provided, however, a POTW which does not have an approved

pretreatment program may, pending approval of such a program, conditionally give credits as provided in paragraph (d) of this section.

(iv) *Sludge requirements.* The granting of removal credits will not cause the POTW to violate the local, State and Federal Sludge Requirements which apply to the sludge management method chosen by the POTW. Alternatively, the POTW can demonstrate to the Approval Authority that even though it is not presently in compliance with applicable Sludge Requirements, it will be in compliance when the Industrial User(s) to whom the removal credit would apply is required to meet its categorical Pretreatment Standard(s) as modified by the removal credit. If granting removal credits forces a POTW to incur greater sludge management costs than would be incurred in the absence of granting removal credits, the additional sludge management costs will not be eligible for EPA grant assistance.

(v) *NPDES permit limitations.* The granting of removal credits will not cause a violation of the POTW's permit limitations or conditions. Alternatively, the POTW can demonstrate to the Approval Authority that even though it is not presently in compliance with applicable limitations and conditions in its NPDES permit, it will be in compliance when the Industrial User(s) to whom the removal credit would apply is required to meet its categorical Pretreatment Standard(s), as modified by the removal credit provision.

(4) *Calculation of revised discharge limits.* Revised discharge limits for a specific pollutant shall be derived by use of the following formula:

$$y = \frac{x}{1-r}$$

where:

x = pollutant discharge limit specified in the applicable categorical Pretreatment Standard
r = removal credit for that pollutant as established under paragraph (b) of this section (percentage removal expressed as a proportion, i.e., a number between 0 and 1)
y = revised discharge limit for the specified pollutant (expressed in same units as x)

(b) *Establishment of Removal Credit; Demonstration of Consistent Removal.* A POTW may be authorized to grant a removal credit that does not exceed its consistent removal rate. In order to demonstrate consistent removal, the POTW shall, for each pollutant with respect to which removal credit authorization is sought, collect influent and effluent data and calculate consistent removal in accordance with the following requirements. As a condition of retaining removal credit authorization, the POTW's consistent removal must continue to be equal to or greater than the removal credit.

(1) *Number of samples.* At least twelve representative samples of influent and effluent shall be taken at approximately equal intervals throughout one full year. Upon concurrence of the Approval Authority, a POTW may utilize an historical data base either in lieu of or as a supplement to these twelve samples. In order to be approved, the historical data base must be representative of the yearly and seasonal conditions to which the POTW is subject and be representative of the POTW's performance for at least one year. As an alternative to the above, a POTW, upon concurrence of the Approval Authority, may utilize an alternative sampling design, as long as the alternative design provides for samples to be taken at times which are representative of the POTW's normal operating

conditions and the different seasonal conditions to which the POTW is subject.

(2) *Method of Sampling.* The POTW must use the composite sampling method unless the grab sampling method is more appropriate. A description of these methods and suggestions on when each method should be used are included in Appendix E as guidance.

(3) *Method of Analysis for Pollutants.* The POTW shall analyze the samples for pollutants in accordance with the analytical techniques prescribed in 40 CFR Part 136. If 40 CFR Part 136 does not contain analytical techniques for the pollutant in question, or if the Approval Authority determines that Part 136 analytical techniques are inappropriate, the analysis shall be performed using validated analytical methods or any other applicable analytical procedures approved by the Approval Authority, including procedures suggested by the POTW.

(4) *Calculation of Consistent Removal.* (i) The consistent removal, denoted by r, for a specific pollutant shall be the difference between the average concentrations of the pollutant in the influent of the POTW, denoted by I, and the average concentrations of the pollutant in the effluent of the POTW, denoted by E, divided by the average concentrations of the pollutant in the influent, denoted by I, as follows:

$$r = \frac{I-E}{I}$$

The average concentrations of the pollutant in the influent and effluent shall be calculated by taking the arithmetic average of all influent and effluent data, respectively. In calculating consistent removal under the subparagraph, all sample data must be used.

(ii) If a pollutant is only measurable in some of the influent and effluent samples (including the situation

where it is not measurable in any effluent samples) and the POTW elects to calculate consistent removal in accordance with paragraph (b)(4)(i), influent and effluent observations below the limit of detectability should be assigned a value equal to the limit of detectability. In calculating consistent removal under paragraph (b)(4)(i), all sample data, including those set at the limit of detectability, must be used.

(iii) If a pollutant is only measurable in some influent and effluent samples (including the situation where it is not measurable in any effluent samples) and the POTW elects not to calculate consistent removal in accordance with paragraph (b)(4)(i), or if a pollutant is not measurable in any of the influent samples (in which case the sample data may not be used to calculate consistent removal in accordance with paragraph (b)(4)(i), the POTW may (A) use historical data as provided in paragraph (b)(1) of this section to calculate consistent removal, or (B) upon the concurrence of the Approval Authority, the POTW may use data from treatability studies, demonstrated removal at similar treatment facilities or provide some other alternative means to demonstrate its consistent removal.

(iv) For purposes of this paragraph "measurable" refers to the ability of the analytical method to quantify as well as identify the presence of the pollutant in question. "Limit of detectability" refers to the lowest limit at which the analytical method can quantify the pollutant in question.

(c) *Provisional credits.* For pollutants which are not being discharged currently (i.e., new or modified facilities, or production changes) the POTW may apply for authorization to give removal credits prior to the initial discharge of the pollutant. Consistent removal shall be based provisionally on data from treatability studies or demonstrated removal at other treatment

facilities where the quality and quantity of influent are similar. Within 18 months after the commencement of discharge of pollutants in question, consistent removal must be demonstrated pursuant to the requirements of paragraph (b). If, within 18 months after the commencement of the discharge of the pollutant in question, the POTW cannot demonstrate consistent removal pursuant to the requirements of paragraph (b) of this section, the authority to grant provisional removal credits shall be terminated by the Approval Authority and all Industrial Users to whom the revised discharge limits had been applied shall achieve compliance with the applicable categorical Pretreatment Standard(s) within a reasonable time, not to exceed the period of time prescribed in the applicable categorical Pretreatment Standard(s), as may be specified by the Approval Authority.

(d) *Exception to POTW Pretreatment Program Requirement.* A POTW required to develop a local pretreatment program by § 403.8 may conditionally give removal credits pending approval of such a program in accordance with the following terms and conditions:

(1) All Industrial Users who are currently subject to a categorical Pretreatment Standard and who wish conditionally to receive a removal credit must submit to the POTW the information required in § 403.12(b)(1)-(7) (except new or modified industrial users must only submit the information required by § 403.12(b)(1)-(6)), pertaining to the categorical Pretreatment Standard as modified by the removal credit. The Industrial Users shall indicate what additional technology, if any, will be needed to comply with the categorical Pretreatment Standard(s) as modified by the removal credit;

(2) The POTW must have submitted to the Approval Authority an application for pretreatment program approval meeting the requirements of §§ 403.8 and

403.9 in a timely manner, not to exceed the time limitation set forth in a compliance schedule for development of a pretreatment program included in the POTW's NPDES permit, but in not [sic] case later than July 1, 1983, where no permit deadline exists;

(3) The POTW must:

(i) Compile and submit data demonstrating its consistent removal in accordance with paragraph (b) of this section;

(ii) Comply with the conditions specified in paragraph (a)(3) of this section; and

(iii) Submit a complete application for removal credit authority in accordance with paragraph (e) of this section;

(4) If a POTW receives authority to grant conditional removal credits and the Approval Authority subsequently makes a final determination, after appropriate notice, that the POTW failed to comply with the conditions in paragraphs (d)(2) and (3) of this section, the authority to grant conditional removal credits shall be terminated by the Approval Authority and all Industrial users to whom the revised discharge limits had been applied shall achieve compliance with the applicable categorical Pretreatment Standard(s) within a reasonable time, not to exceed the period of time prescribed in the applicable categorical Pretreatment Standard(s), as may be specified by the Approval Authority.

(5) If a POTW grants conditional removal credits and the POTW or the Approval Authority subsequently makes a final determination, after appropriate notice, that the Industrial User(s) failed to comply with the conditions in paragraph (d)(1) of this section, the conditional credit shall be terminated by the POTW or the Approval Authority for the non-complying Industrial User(s) to whom the revised discharge limits had been applied shall achieve compliance

with the applicable categorical Pretreatment Standard(s) within a reasonable time, not to exceed the period of time prescribed in the applicable categorical Pretreatment Standard(s), as may be specified by the Approval Authority. The conditional credit shall not be terminated where a violation of the provisions of this paragraph results from causes entirely outside of the control of the Industrial User(s) or the Industrial User(s) had demonstrated substantial compliance.

(6) The Approval Authority may elect not to review an application for conditional removal credit authority upon receipt of such application, in which case the conditionally revised discharge limits will remain in effect until reviewed by the Approval Authority. This review may occur at any time in accordance with the procedures of § 403.11, but in no event later than the time of any pretreatment program approval or any NPDES permit reissuance thereunder.

(e) *POTW application for authorization to give removal credits and Approval Authority review—(1) Who must apply.* Any POTW that wants to give a removal credit must apply for authorization from the Approval Authority.

(2) *To whom application made.* An application for authorization to give removal credits (or modify existing ones) shall be submitted by the POTW to the Approval Authority.

(3) *When to apply.* A POTW may apply for authorization to give or modify removal credits at any time.

(4) *Contents of the Application.* An application for authorization to give removal credits must be supported by the following information:

(i) *List of pollutants.* A list of pollutants for which removal credits are proposed.

(ii) *Consistent Removal Data.* The data required pursuant to paragraph (b).

(iii) *Calculation of revised discharge limits.* Proposed revised discharge limits for each affected subcategory of Industrial Users calculated in accordance with paragraph (a)(4) of this section.

(iv) *Local Pretreatment Program Certification.* A certification that the POTW has an approved local pretreatment program or qualifies for the exception to this requirement found at paragraph (d) of this section.

(v) *Sludge Management Certification.* A specific description of the POTW's current methods of using or disposing of its sludge and a certification that the granting of removal credits will not cause a violation of the sludge requirements identified in paragraph (a)(3)(iv) of this section.

(vi) *NPDES Permit Limit Certification.* A certification that the granting of removal credits will not cause a violation of the POTW's NPDES permit limits and conditions as required in paragraph (a)(3)(v) of this section.

(5) *Approval Authority Review.* The Approval Authority shall review the POTW's application for authorization to give or modify removal credits in accordance with the procedures of § 403.11 and shall, in no event, have more that [sic] 180 days from public notice of an application to complete review.

(6) *EPA review of State removal credit approvals.* Where the NPDES State has an approved pretreatment program, the Regional Administrator may agree in the Memorandum of Agreement under 40 CFR 123.24(d) to waive the right to review and object to submissions for authority to grant removal credits. Such an agreement shall not restrict the Regional Administrator's right to comment upon or object to permits issued to POTWs except to the extent 40 CFR 123.24(d) allows such restriction.

(7) Nothing in these regulations precludes an Industrial User or other interested party from assisting the POTW in preparing and presenting the information necessary to apply for authorization.

(f) *Continuation and withdrawal of authorization*—(1) *Effect of authorization.* (i) Once a POTW has received authorization to grant removal credits for a particular pollutant regulated in a categorical Pretreatment Standard it may automatically extend that removal credit to the same pollutant when it is regulated in other categorical standards, unless granting the removal credit will cause the POTW to violate the sludge requirements identified in (a)(3)(iv) of this section or its NPDES permit limits and conditions as required by (a)(3)(v). If a POTW elects at a later time to extend removal credits to a certain categorical Pretreatment Standard, industrial subcategory or one or more Industrial Users that initially were not granted removal credits, it must notify the Approval Authority.

(2) *Inclusion in POTW permit.* Once authority is granted, the removal credits shall be included in the POTW's NPDES Permit as soon as possible and shall become an enforceable requirement of the POTW's NPDES permit. The removal credits will remain in effect for the term of the POTW's NPDES permit, provided the POTW maintains compliance with the conditions specified in subparagraph (4) of this paragraph.

(3) *Compliance monitoring.* Following authorization to give removal credits, a POTW shall continue to monitor and report on (at such intervals as may be specified by the Approval Authority, but in no case less than once per year) the POTW's removal capabilities. A minimum of one representative sample per month during the reporting period is required, and

all sampling data must be included in the POTW's compliance report.

(4) *Modification or withdrawal of removal credits.* (i) Compliance with the conditions in paragraph (a)(3)(iii)-(v) of this section may be examined by the Approval Authority whenever it elects and must, at the very least, be examined whenever the POTW's NPDES permit is reissued. If the Approval Authority determines, on the basis of compliance monitoring reports or other information available to it, that the conditions specified in paragraphs (a)(3)(iii)-(v) of this section are not being met, the Approval Authority shall withdraw the POTW's authority to grant removal credits or modify those credits in accordance with the procedures specified in subparagraph (iii) below.

(ii) If, during the term of the POTW's NPDES permit, the Approval Authority determines that the POTW's consistent removal rate is consistently and substantially lower than the removal credit specified in the POTW's NPDES permit, the Approval Authority shall either withdraw the POTW's authority to grant removal credits or modify those credits in accordance with the procedures specified in subparagraph (iii) below.

(iii) If the Approval Authority tentatively determines, under subparagraphs (i) or (ii) above, that the withdrawal of a POTW's authority to grant removal credits or modification of those credits is warranted, the Approval Authority shall, in accordance with the procedures specified in § 403.11(b)(1) and (2) of this section, issue a public notice, provide a public comment period of at least 30 days and provide an opportunity for interested persons to request a public hearing. The mailing list for the public notice shall include, at a minimum, the POTW and Industrial Users to whom revised discharge limits have been

applied. If the Approval Authority finally determines to withdraw the POTW's authority to grant removal credits or to modify those removal credits the POTW is authorized to grant, it shall notify the POTW, all Industrial Users to whom revised limits have been applied and each person who has requested individual notice of its decision and the basis for that decision. Notice shall also be published in the same newspaper as the original notice of the tentative determination was published. Following such notice and modification or withdrawal, all Industrial Users to whom revised discharge limits have been applied shall be subject to the modified discharge limits or the discharge limits prescribed in the applicable categorical Pretreatment Standard(s), as appropriate, and shall achieve compliance with such limits within a reasonable time, not to exceed the period of time prescribed in the applicable categorical Pretreatment Standard(s), as may be specified by the Approval Authority.

(g) *Removal credits in State-run pretreatment programs under § 403.10(e).* Where an NPDES State with an approved pretreatment program elects to implement a local pretreatment program in lieu or [sic] requiring the POTW to develop such a program (as provided in 403.10(e)), the POTW will not be required to develop a pretreatment program as a precondition to obtaining authorization to give removal credits. The POTW will, however, be required to comply with the other conditions of paragraph (a)(3) of this section.

[49 FR 31221, Aug. 3, 1984]

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-3530

NATURAL RESOURCES DEFENSE COUNCIL, INC.
Petitioner

v.

U. S. ENVIRONMENTAL PROTECTION AGENCY
Respondent

CHEMICAL MANUFACTURERS ASSOCIATION
Intervenor

CHICAGO ASSOC. OF COMMERCE & INDUSTRY, ILLINOIS MANUFACTURERS' ASSOC. AND MID-AMERICA LEGAL FOUNDATION
Intervenors

No. 85-3012

CERRO COPPER PRODUCTS COMPANY, AND VILLAGE OF SAUGET
Petitioners

v.

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
and
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Respondents

NATURAL RESOURCES DEFENSE COUNCIL, INC.
Intervenor

SUR PETITION FOR REHEARING

PRESENT: ALDISERT, *Chief Judge*, ADAMS, GIBBONS, WEIS, HIGGINBOTHAM, SLOVITER, BECKER STAPLETON and MANSMANN, *Circuit Judges*, and HUNTER and GARTH, *Senior Circuit Judges*.

The petition for rehearing filed by intervenor, Chemical Manufacturers Association, in the above-entitled cases having been submitted to the judges who participated in the decision of this court, and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

A. Leon Higginbotham
Circuit Judge

Dated: July 11, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-3530

NATURAL RESOURCES DEFENSE COUNCIL, INC.
Petitioner

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WILLIAM D. RUCKELSHAUS, ADMINISTRATOR,
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SUR PETITION FOR REHEARING

PRESENT: ALDISERT, *Chief Judge*, ADAMS, GIBBONS, WEIS, HIGGINBOTHAM, SLOVITER, BECKER STAPLETON and MANSMANN, *Circuit Judges,* and HUNTER and GARTH, *Senior Circuit Judges.*

The petition for rehearing filed by respondents, Lee M. Thomas and the U.S. Environmental Protection Agency,in the above-entitled cases having been submitted to the judges who participated in the decision of this court, and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

A. Leon Higginbotham
Circuit Judge

Dated: July 11, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-3530

NATURAL RESOURCES DEFENSE COUNCIL, INC.
Petitioner

v.

U. S. ENVIRONMENTAL PROTECTION AGENCY
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CHEMICAL MANUFACTURERS ASSOCIATION
Intervenor

CHICAGO ASSOC. OF COMMERCE & INDUSTRY, ILLINOIS MANUFACTURERS' ASSOC. AND MID-AMERICA LEGAL FOUNDATION
Intervenors

No. 85-3012

CERRO COPPER PRODUCTS COMPANY, AND VILLAGE OF SAUGET
Petitioners

v.

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
and
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Respondents

NATURAL RESOURCES DEFENSE COUNCIL, INC.
Intervenor

SUR PETITION FOR REHEARING

PRESENT: ALDISERT, *Chief Judge,* ADAMS, GIBBONS, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON and MANSMANN, *Circuit Judges,* HUNTER and GARTH, *Senior Circuit Judges*

The petition for rehearing filed by intervenors, Chicago Association of Commerce and Industry, Illinois Manufacturers' Association and Mid-America Legal Foundation, in the above-entitled cases having been submitted to the judges who participated in the decision of this court, and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court

A. Leon Higginbotham
Circuit Judge

Dated: July 11, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-3530

NATURAL RESOURCES DEFENSE COUNCIL, INC.
Petitioner

v.

U. S. ENVIRONMENTAL PROTECTION AGENCY
Respondent

CHEMICAL MANUFACTURERS ASSOCIATION
Intervenor

CHICAGO ASSOC. OF COMMERCE & INDUSTRY, ILLINOIS MANUFACTURERS' ASSOC. AND MID-AMERICA LEGAL FOUNDATION
Intervenors

No. 85-3012

CERRO COPPER PRODUCTS COMPANY, AND VILLAGE OF SAUGET
Petitioners

v.

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
and
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Respondents

NATURAL RESOURCES DEFENSE COUNCIL, INC
Intervenor

SUR PETITION FOR HEARING

PRESENT: HUNTER, GARTH, and HIGGINBOTHAM, *Circuit Judges*,

The petition for rehearing filed by petitioners, Cerro Copper Products Company and Billage of Sauget, in the above-entitled cases having been submitted to the judges who participated in the decision having asked for rehearing, the petition for rehearing is denied.

By the Court,

A. Leon Higginbotham
Circuit judge

Dated: July 11, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 84-3530

NATURAL RESOURCES DEFENSE COUNCIL Inc., etc., et al.

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, ETC.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until August 17, 1986.

Circuit Judge

Dated: July 28, 1986

(2) (4)

Nos. 86-239 and 86-608

FILED
DEC 18 [illegible]
[illegible], JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

CHEMICAL MANUFACTURERS ASSOCIATION, PETITIONER

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

CHICAGO ASSOCIATION OF COMMERCE AND INDUSTRY, ET AL., PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Section 307(b)(1) of the Clean Water Act, 33 U.S.C. 1317(b)(1) authorizes the Environmental Protection Agency (EPA) to promulgate pretreatment standards applicable to industrial discharges into publicly owned treatment works. Section 307(b)(1) also provides that EPA may permit revision of pretreatment requirements to reflect removal of toxic pollutants achievable by publicly owned treatment works as long as those "removal credits" do not prevent sludge use or disposal by such works in accordance with Section 405 of the Act, 33 U.S.C. 1345. The questions presented are:

1. Whether the court of appeals exceeded its jurisdiction, conferred by Section 509(b)(1) of the Clean Water Act, 33 U.S.C. (Supp. II) 1369(b)(1), in ruling that EPA could not promulgate a removal credit rule under Section 307(b) of the Act because EPA had not yet promulgated comprehensive sludge regulations under Section 405 of the Act.

2. Whether EPA may allow removal credits under Section 307(b)(1) prior to promulgating comprehensive sludge regulations pursuant to Section 405.

3. Whether the court of appeals erred in setting aside EPA's determination that, for the purposes of allowing removal credits, the consistent rate of removal of pollutants by publicly owned treatment works can be measured by the average rate of removal achieved by the works.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-239

CHEMICAL MANUFACTURERS ASSOCIATION, PETITIONER

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

No. 86-608

CHICAGO ASSOCIATION OF COMMERCE AND INDUSTRY, ET AL., PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (86-239 Pet. App. A1-A69) is reported at 790 F.2d 289.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1986. The petition for a writ of certiorari in No. 86-239 was filed on August 15, 1986. The petition for a writ of certiorari in No. 86-608 was filed on October 9, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant portions of Sections 307(b)(1) and 405(d) of the Clean Water Act, 33 U.S.C. 1317(b)(1) and 1345(d), are set forth in the appendix to the petition for a writ of certiorari in No. 86-239 (Pet. App. A55-A57).

STATEMENT

1. This case concerns the validity of pretreatment standards promulgated by the Environmental Protection Agency (EPA) pursuant to Section 307(b) of the Clean Water Act, 33 U.S.C. 1317(b). The Clean Water Act, 33 U.S.C. (& Supp. II) 1251 *et seq.*, divides industrial facilities into two groups: direct dischargers into the waters of the United States and indirect dischargers into sewer systems that lead to publicly owned treatment works (POTWs). Direct dischargers are regulated through the National Pollutant Discharge Elimination System permit program (NPDES or Section 402 permit, 33 U.S.C. 1342). The terms and conditions of a NPDES permit are governed by effluent limitations guidelines (see 33 U.S.C. 1314) and by relevant state water quality standards (see 33 U.S.C. 1312). POTWs also are regulated by the NPDES permit system, and for some pollutants that industrial plants discharge, POTWs provide a level of treatment that is equiva-

lent to that required of direct dischargers under the industrial NPDES program.

Congress, however, recognized that POTWs generally were not designed to treat all forms of industrial pollutants. In Section 307(b), Congress directed the Administrator to issue regulations "establishing pretreatment standards" for "those pollutants which are determined not to be susceptible to treatment" by POTWs or "which would interfere with the operation" of POTWs. Congress also recognized that POTWs often do remove at least some offending pollutants. Hence, Congress also authorized POTWs to grant industries "removal credits"—*i.e.*, revisions to the applicable pretreatment standards to reflect the level of pollutant removal by the POTWs (*ibid.*). Under Section 307(b)(1), these credits are available (1) if the combined level of treatment by the indirect discharger and the POTW is equivalent to the effluent limitations imposed on the comparable direct discharger and (2) if the granting of a credit does not "prevent sludge use or disposal" in accordance with Section 405 of the Act (33 U.S.C. 1345). Section 405, in turn, addresses disposal of sewage sludge. Section 405(e) states that the manner of disposal or use of sludge is a local determination, but use or disposal may not violate guidelines established by the EPA Administrator. Section 405(d) states that the Administrator "shall develop and publish * * * regulations providing guidelines for the disposal of sludge."

In 1979, EPA first promulgated sludge criteria pursuant to Section 405(d) for landfilling, land application, and incineration. See 44 Fed. Reg. 53460 (1979) (codified at 40 C.F.R. Pt. 257). Sludge disposal is also regulated by a variety of statutes de-

pending upon the method of disposal. For example, ocean dumping of sludge requires a permit under the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. 1401 *et seq.*, and sludge incineration is regulated by Section 111 of the Clear Air Act, 42 U.S.C. 7411. EPA has consistently interpreted the Section 307(b) requirement that removal credits not prevent the use or disposal of sludge to mean that whatever use or disposal the POTWs make of their sludge, they must comply with all applicable federal, state, and local requirements, not just whatever guidelines EPA may have explicitly promulgated under Section 405(d). See 43 Fed. Reg. 27749 (1978); 40 C.F.R. 403.7(a)(3)(iv).

2. In 1978, EPA promulgated General Pretreatment Regulations that established the administrative framework for all indirect dischargers, including provision for removal credits (see 43 Fed. Reg. 27736 (1978)).[1] The Natural Resources Defense Council, Inc. (NRDC) and various industry groups sought review of those regulations in the Court of Appeals for the District of Columbia Circuit. This litigation was stayed pending a settlement agreement with the industry petitioners in which EPA agreed to propose changes to the 1978 regulations. EPA subsequently published revised regulations on January 28, 1981 (see 46 Fed. Reg. 9404), which both NRDC and industry groups challenged by filing petitions for review that were heard in the Third Circuit. In *National Ass'n of Metal Finishers* v. *EPA (NAMF)*,

[1] EPA has also promulgated categorical regulations for many industries to establish pretreatment standards for the pollutants discharged by those industries. EPA plans to promulgate additional categorical regulations for several industries.

719 F.2d 624 (1983), rev'd in part *sub nom. Chemical Manufacturers Ass'n* v. *NRDC*, 470 U.S. 116 (1985), the Third Circuit upheld the removal credit provisions of the regulations but set aside other portions of the regulations, including the "fundamentally different factor" variance provision for pretreatment standards. The latter ruling was reversed by this Court in *Chemical Manufacturers Ass'n.*

In 1984, EPA promulgated revisions to the removal credit provisions of the pretreatment regulations (see 49 Fed. Reg. 31212). These revisions, inter alia, (1) changed the measure of "consistent removal" of pollutants, for the purpose of calculating the appropriate credit, from removal rates attained at least 75% of the time to average removal rates; (2) eliminated the adjustment for storm water bypass of the POTW; and (3) provided that removal credit authorization would not be withdrawn during the effective period of a POTW's NPDES permit, except in instances of substantial under-removal of pollutants. During the comment period, NRDC claimed that EPA should not authorize removal credits because a comprehensive set of Section 405 sludge regulations had not been promulgated (86-239 Pet. App. A6-A7).

On review, the Third Circuit held that EPA's removal credit rule was arbitrary and capricious in several respects (86-239 Pet. App. A1-A55).[2] First, the court ruled that the rule did not provide for consistent removal of pollutants equivalent to the removal achieved by direct dischargers. The court

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[2] Petitioners are the Chemical Manufacturers Association, Chicago Association of Commerce and Industry, Illinois Manufacturers Association, and related entities that intervened as respondents in the court of appeals.

found that basing credits on average removal rates achieved by POTWs meant that when the plants were operating at below average performance, the dischargers would exceed the daily or monthly effluent limitations applicable to direct dischargers (*id.* at A29). Second, the court disapproved of EPA's decision to ignore the effects of storm water bypasses of the treatment plant. EPA had estimated that such bypasses contributed approximately eight percent of the pollutants discharged by the system and dismissed this effect as de minimis, but the court of appeals disagreed and found that EPA had ignored the variability of this factor among POTWs (*id.* at A41). Third, the court set aside EPA's determination not to withdraw removal credits except for substantial underremoval of pollutants. The court concluded that under that policy the limits imposed on direct dischargers would not be equivalent to the limits imposed on indirect dischargers and POTWs, as required by the Clean Water Act (*id.* at A46). Finally, the court of appeals held that EPA erred in authorizing the issuance of removal credits prior to promulgating a comprehensive set of sludge regulations pursuant to Section 405. The court determined that NRDC was not precluded from raising this challenge by the 90-day review period in Section 509(b) of the Act, 33 U.S.C. (Supp II) 1369(b), even though NRDC might have raised the issue in response to earlier rulemakings (86-239 Pet. App. A49). On the merits, the court noted that EPA had acknowledged that additional sludge rules were necessary. The court also concluded that EPA's "device of incorporating other regulations" did not meet the requirements of Section 405 (86-239 Pet. App. A52).

ARGUMENT

The decision of the court of appeals is erroneous and may impose additional, ultimately unnecessary, costs on industrial indirect dischargers that must comply with pretreatment standards under the Clean Water Act. Nevertheless, we cannot conclude that further review by this Court is warranted, since EPA rulemaking efforts now in progress should eventually alleviate the principal burdens created by the decision.

1. Petitioner Chemical Manufacturers Association (CMA) asserts that the court of appeals lacked jurisdiction under Section 509(b) of the Act, 33 U.S.C. (Supp II) 1369(b), to review the adequacy of the Section 405 sludge regulations. CMA argues, first, that promulgation of regulations under Section 405 of the Act is not one of the "Administrator's action[s]" expressly made reviewable in the court of appeals by Section 509(b) (see Pet. 14) and, second, even if promulgation of Section 405 regulations was reviewable, NRDC's challenge in early 1985 was time-barred because NRDC failed to seek review of the regulations, issued in 1979 and amended in 1981, within 90 days as required by Section 509(b) (see Pet. 17).

We do not believe, however, that this case presents a proper vehicle for considering the claimed limitation on a court of appeals' jurisdiction imposed by Section 509(b). The issue before the court of appeals was not whether to compel the Agency to promulgate regulations under Section 405; such an issue, as petitioner CMA points out (Pet. 15), could only be raised, in the first instance, in a district court. See 33 U.S.C. 1365. Instead, the issue before the court of appeals was whether EPA was authorized by statute

to adopt a removal credits program under Section 307(b) of the Act. Section 509(b)(1)(C) explicitly provides that "[r]eview of the Administrator's action * * * in promulgating any * * * pretreatment standard under section 307 * * * may be had [in the court of appeals]," and hence, apart from timeliness concerns, we do not dispute that the court of appeals had jurisdiction over NRDC's challenge to the removal credit rule.

Second, although we disagree with the court of appeals' ruling that NRDC's challenge to the removal credit program is timely,[3] that ruling is limited to the unusual circumstances presented by this case and it is, therefore, relatively unimportant. As the court of appeals observed, Section 509(b) permits late challenges to administrative actions "on 'grounds which arose after' " the 90-day period for petitioning for review has expired (86-239 Pet. App. A49). While we disagree with the court's finding that the lengthy delay in promulgating additional Section 405 regulations qualified NRDC's challenge under this exception (*ibid.*), that determination is not of sufficient significance to warrant this Court's review.[4]

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[3] We argued below that NRDC's lawsuit was untimely because the legal basis for NRDC's current challenge to the removal credit provision—the absence of comprehensive Section 405 sludge guidelines—had existed as well in 1978 (when EPA first promulgated removal credit regulations) and NRDC had failed to assert that ground in its earlier challenge to the 1978 pretreatment regulations.

[4] We strongly disagree with the court of appeals' suggestion (86-239 Pet. App. A48) that the changes made by the 1984 rule and the reprinting of the rule in its entirety authorized a challenge after the 90-day period set forth in Section 509(b) to removal credit provisions that were not changed in 1984.

2. Petitioner CMA also asserts (Pet. 17, 22) that the court of appeals' decision to set aside EPA's reasonable, long-standing interpretation of the Clean Water Act was contrary to the rationale of *Chemical Manufacturers Ass'n* v. *NRDC*, 470 U.S. 116 (1985), and *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). We agree that the court of appeals should have deferred to EPA's interpretation of the relationship between Section 405 sludge regulations and the removal credits provisions of Section 307(b). The court of appeals' blanket reliance (86-239 Pet. App. A31) on the Senate Report (S. Rep. 95-370, 95th Cong., 1st Sess. 57-58 (1977)) to support its interpretation is, moreover, misdirected because the Conference Committee substantially rejected the Senate version of the relevant provisions when the Committee fashioned the Conference bill ultimately enacted in 1977. See H.R. Conf. Rep. 95-830, 95th Cong., 1st Sess. 86-88 (1977).

We also share petitioner CMA's concern that the court of appeals' decision threatens to impose hardships on the regulated community. By forbidding removal credits in the absence of more comprehensive Section 405 sludge guidelines, the court of appeals' decision will force some individual indirect dischargers, which must comply now or in the near future with categorical pretreatment standards, to invest in pollution control systems that may ultimately be unnecessary once EPA has promulgated Section 405 sludge guidelines and made removal credits available.

Nevertheless, we do not urge further review. It is our view that, ultimately, disruption to the pretreatment program can be substantially cured by promulgation of the Section 405 regulations required by the court of appeals. As noted by petitioner CMA (Pet.

11-12), the EPA regulatory agenda had Section 405 regulations scheduled for promulgation in September 1987. The Agency, however, will not be able to meet that timetable. The earliest it now expects to be able to *propose* Section 405 regulations is August 1987. This rulemaking is one of the most complex on which the Agency is working; it raises issues that affect many of the Agency's programs under a host of federal environmental laws. We acknowledge that the unavailability of removal credits during the interim will impose a significant impact on some members of the regulated community. Because, however, the Agency is presently engaged in the process of filling the regulatory gap perceived by the court of appeals, we do not believe that the legal issues presented warrant further review.

3. Petitioners Chicago Association of Commerce and Industry, et al. (CACI), also seek review of that portion of the court of appeals' ruling that struck down the use of POTWs' average removal rate to calculate the appropriate "removal credit" (86-608 Pet. 4). Petitioner CACI asserts that the court of appeals' decision mandates compliance with the monthly and daily discharge limitations imposed on direct dischargers (*id.* at 5). We believe that the relationship between the effluent limitations in a direct discharger's NPDES Permit and the calculation of allowable removal credits available to an indirect discharger is quite complex, given the existing methodology for calculation of POTW removal rates. The court of appeals' decision is quite explicit in ruling that the use of average removal rates to calculate removal credits does not provide for consistent removal of pollutants equivalent to the level of treatment required of direct dischargers (86-239 Pet. App.

A46). Precisely what showing of consistent removal would be required should EPA promulgate new removal credit regulations, however, is not clearly stated in the court of appeals' opinion.[5] In these circumstances, we believe it appropriate to await the judicial response to the promulgation of new regulations rather than for this Court to undertake review of the issue now.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1986

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[5] We note that in *NAMF* v. *EPA*, 719 F.2d 624 (3d Cir. (1983)), the court of appeals upheld removal credit regulations that were based on the removal rates achieved by the POTW 75% of the time.

* The Solicitor General is disqualified in this case.

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Nos. 86-239 and 86-608

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

CHEMICAL MANUFACTURERS ASSOCIATION,
Petitioner

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.,
Respondents

CHICAGO ASSOCIATION OF COMMERCE AND INDUSTRY, ET AL.,
Petitioners

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.,
Respondents

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT THE NATURAL RESOURCES DEFENSE COUNCIL

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QUESTIONS PRESENTED

1. Whether the Third Circuit correctly held that Sections 307(b)(1) and 405 of the Clean Water Act, 33 U.S.C. 1317(b)(1) and 1345, prohibit EPA from relaxing national pretreatment standards through removal credits without promulgating the sludge regulations which are a precondition to credits.

2. Whether the Third Circuit correctly held that Section 307(b)(1) of the Clean Water Act, 33 U.S.C. 1317(b)(1), authorizes removal credits only for pollutant removal which meets the same standard of consistency that a direct discharger must meet.

PARTIES

In addition to those named in the caption, the parties are: Illinois Manufacturers' Association and Mid-America Legal Foundation (petitioners in No. 86-608) and the U.S. Environmental Protection Agency (respondent).

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

Nos. 86-239 and 86-608

Chemical Manufacturers Association,
Chicago Ass'n. of Commerce and Industry, *et al.*,
Petitioners,

v.

Natural Resources Defense Council, Inc., *et al.*,
Respondents.

OPINION BELOW

The opinion of the court of appeals (CMA App. A-1 to A-69)[1] is reported at 790 F.2d 289.

STATUTE AND REGULATIONS INVOLVED

The relevant portions of Sections 307(b)(1) and 405(d) of the Clean Water Act, 33 U.S.C. 1317(b)(1) and 1345(d), are reproduced at CMA App. A-55 to A-57. The removal credits provision, 40 C.F.R. 403.7, is reproduced at CMA App. A-57 to A-69.

STATEMENT OF THE CASE

The Clean Water Act, 33 U.S.C. (& Supp. II) 1251 *et seq.*, directs EPA to control two types of industrial polluters: (1)

1. As used herein, "CMA App." refers to the appendix to the petition in No. 86-239. "CMA Pet." refers to the petition in No. 86-239 filed by the Chemical Manufacturers Association. "CACI Pet." refers to the petition in No. 86-608 filed by the Chicago Association of Commerce and Industry, *et al.* "EPA Br." refers to the Brief for the Federal Respondents in Opposition to both petitions.

"direct" dischargers, which pipe toxic wastewater directly into navigable waters, and (2) "indirect" dischargers, which pipe toxic wastes to publicly owned treatment works (POTWs) which, in turn, discharge to navigable waters.

Most POTWs are designed to treat conventional wastes, not industrial toxics. Industrial toxics can damage the POTW, pass through it to rivers and drinking water supplies, or contaminate its sludge. *A Legislative History of the Clean Water Act of 1977*, Cong. Research Service, Comm. Print No. 14, 95th Cong., 2d Sess. 690-691 (1978) [hereinafter *1977 Legis. Hist.*]

Congress therefore directed EPA to set national "pretreatment" standards dramatically limiting the toxicity of industrial discharges to POTWs. 33 U.S.C. 1317(b)(1). Congress also told EPA to develop regulations to prevent industrial wastes from contaminating POTW sludge and to encourage productive use (i.e., recycling) of sludge. 33 U.S.C. 1345(d). Finally, because some POTWs can remove some toxics, Congress authorized EPA to approve "removal credits" or adjustments to national pretreatment standards at qualifying POTWs. 33 U.S.C. 1317(b)(1). Industries using these POTWs could then discharge larger quantities of toxics than would otherwise be allowed.

POTWs applying for authority to grant industry credits had to show: 1) that the POTW, in conjunction with industry, could reduce the toxics in its discharge to the same level as a direct discharger, and 2) that reliance on the POTW's treatment system would not produce unacceptably toxic POTW sludge. *Id.*

In 1978 EPA issued, and in 1981, in response to industry criticisms, revised, rules implementing the pretreatment provisions, including the removal credit authority. The Third Circuit upheld the removal credit portion of the rules against industry's challenge. *National Ass'n. of Metal Finishers v. EPA*, 719 F.2d 624 (1983) [hereinafter *NAMF*]. Industry sought this Court's review of some aspects of that decision, but did not take issue with the holding on removal credits. *Chemical Manufacturers Ass'n. v. NRDC*, 470 U.S. 116 (1985) (reversing part of *NAMF* unrelated to removal credits).

Despite this seemingly final resolution, a few industry groups continued to criticize the removal credit rule. They argued that many POTWs were uninterested in credits, but might be induced to apply if EPA relaxed the requirements. To appease these concerns, in 1984 EPA relaxed every key component of its removal credit rule, making larger credits possible. CMA App. A-13 to A-14. On review, the Third Circuit held that: 1) the revised rule violated the plain language of the Clean Water Act, and 2) EPA had also acted arbitrarily and capriciously, given the rulemaking record. CMA App. A-19 to A-34 and A-46 to A-52.

The Chemical Manufacturers Association (CMA) seeks review of Part VI of the Third Circuit's decision holding that EPA may not approve removal credits without promulgating the sludge regulations which are a precondition to credits. The Chicago Association of Commerce and Industry *et al.* (CACI) joins CMA's petition and also seeks certiorari of Part III of the Third Circuit's decision holding that EPA's method of calculating a POTW's waste removal must comply with the statutory requirement that indirect dischargers (in conjunction with their POTW) meet the same pollution control standards as direct dischargers.[2] EPA and NRDC oppose both petitions.

REASONS FOR DENYING THE PETITIONS

The Third Circuit's decision does not present issues sufficiently important to warrant this Court's attention, does not conflict with the decisions of this Court or any other Circuit, and is required by both the express language of the statute and the legislative history. Review by this Court is not warranted.

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2. The Third Circuit also found other statutory violations which are not at issue here: 1) EPA ignored untreated sewer overflows in calculating a POTW's toxic waste "removal" and 2) EPA erred by allowing up to eight years of violative discharges before it had to withdraw approval for removal credits. CMA App. A-34 to A-46.

1. THIS CASE IS NOT SUFFICIENTLY IMPORTANT TO WARRANT THIS COURT'S ATTENTION.

a. The nub of CMA's petition is likely to be resolved before this Court can decide the case. The petition presents a single issue: may EPA authorize removal credits without issuing the sludge regulations required by Section 405 of the Act? EPA has pledged to resolve this issue by promulgating Section 405 rules. EPA Br. 9-10. Several intermediate rulemaking steps are already complete,[3] and EPA expects to propose the rules by August, 1987 or thereabouts. EPA Br. 10.

Congress[4] or the courts[5] may well force EPA to expedite this schedule. But even if they do not, the central feature of this controversy should dissolve during 1987.[6]

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3. For example, in July 1985, EPA produced an environmental profile document and hazard index for each of 50 toxics in municipal sludge. *Summary of Environmental Profiles and Hazard Indices for Constituents of Municipal Sludge: Methods and Results*, U.S. EPA, Office of Water Regulations and Standards. Last year, EPA sought public comment on proposed rules for state management of the federally mandated sludge program. 51 Fed. Reg. 4458 (Feb. 4, 1986).

4. Last session, both Houses of Congress unanimously passed the Water Quality Act of 1986, which directed EPA to *promulgate* the long overdue Section 405 sludge rules by August 31, 1987. S. 1128, 99th Cong., 2d Sess. §406(a)(3), 132 Cong. Rec. H.10,551 (1986). Although the President pocket-vetoed the bill, the House reapproved the identical legislation by a vote of 406 to 8 this session, H.R. 1, 100th Cong., 1st Sess. §406(a)(3), 133 Cong. Rec. 210 (1987), and Senate leaders have promised similar action, 133 Cong. Rec. S.17-18 (daily ed. Jan. 6, 1987) (statements of Senators Byrd and Dole on S.1, the Water Quality Act of 1987).

5. Section 405(d) of the Act set a 1978 deadline for EPA's sludge rules. Because EPA violated this deadline, a district court, under Section 505(a)(2) of the Act, 33 U.S.C. 1365(a)(2), can compel EPA to issue the rules at the earliest possible date. *See, e.g., NAMF*, 719 F.2d at 642, *rev'd in nonrelevant part, Chemical Manufacturers Ass'n. v. NRDC*, 470 U.S. 116 (1985); *Pennsylvania Dep't. of Environmental Resources v. EPA*, 618 F.2d 991, 1000 (3d Cir. 1980).

6. The Clean Water Act and the Administrative Procedure Act together require EPA to seek public comment on the proposed rules. 33 U.S.C. 1345(d) and 5 U.S.C. 553. EPA can issue final rules shortly thereafter. EPA will presumably give high priority to final promulgation of these rules. EPA has said that these rules will "substantially cure" any disruption to the pretreatment program. EPA Br. 9.

b. This case will temporarily affect at most a very small number—possibly only five—POTWs in the country. That is because Congress intended removal credits to be granted sparingly and only under stringent conditions. *See* CMA App. A-31 to A-32. Many POTWs cannot meet these conditions. The few who can are often unwilling to assume legal and financial responsibility for treating industry's wastes. *Id.* at A-24, n.12.

Consequently, only one of approximately 1500 eligible POTWs obtained EPA approval for removal credits which appear to comply with all but Section 405 of the Act; four others have pending applications which may similarly qualify. NRDC Appendix A-1 to A-7.[7]

c. The temporary impact of this case, even on the few affected POTWs, is quite limited. Contrary to CMA's assertion, removal credits are not "integral" to a pretreatment program. The essential components of the program—adequate legal authority, clearly defined administrative procedures, and adequate funding and personnel—had to be in place by July, 1983, long before any POTW sought removal credit authority. 40 C.F.R. 403.8(b) and (f).

The removal credit is simply a discretionary supplement to an otherwise functional program. That is precisely why EPA allows POTWs to apply for removal credit authority at any time — even well into program operation. *See* 40 C.F.R. 403.7(e)(3).

In that sense, this case differs substantially from *Chemical Manufacturers Ass'n. v. NRDC*, 470 U.S. 116 (1985). There, EPA argued that, although it rarely granted FDF variances, it nonetheless relied on their availability in establishing BAT and pretreatment standards. Neither EPA nor any petitioner claims

7. Eleven other POTWs received EPA approval to grant removal credits which EPA must now recall for reasons unchallenged by CMA: they either use an incorrect formula for calculating the POTW's pollutant "removal," or they do not account for combined sewer overflows, or both. In addition, ten POTWs have pending applications which fail for the same reasons. *Cf.* NRDC Appendix A-1 to A-7 *with* CMA App. A-19 to A-42. It is uncertain whether any of these POTWs will qualify for, or want, credits when EPA revises its removal credit rules to comply with the other, nonsludge related parts of the Third Circuit's decision.

such sweeping scope here. The pretreatment program could function perfectly well even if the Third Circuit's decision effectively precluded (which it did not), removal credits forever. The only consequence would be that all, rather than most, industries discharging to POTWs would have to meet national pretreatment standards.

d. This case will not affect industry as CMA had projected because of: 1) new developments, and 2) other avenues for relief.

1. CMA had argued that the chemical industry would face pretreatment standards in December, 1986, nine months before EPA issued sludge rules. CMA complained that, during the nine month interval, CMA could not judge its eligibility for removal credits. Hence, CMA would have to design treatment technology to meet standards unmitigated by any removal credit adjustment—or risk violating the statutory three year pretreatment compliance deadline. CMA Pet. 11-12.

EPA has since alleviated CMA's dilemma. EPA postponed pretreatment standards for the chemical industry until August 31, 1987, virtually the identical deadline for proposed sludge rules.[8] EPA also warned that the chemical industry standards may lag even more because of data gaps in that rulemaking record.[9] Hence, CMA will know[10] what its likely removal credit obligations are at the same time as—or in advance of—the date it must begin developing compliance plans.[11]

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8. EPA's deadline for chemical industry pretreatment standards is set by a Consent Order. The district court recently modified the Consent Order to extend the deadline for these standards to August, 1987. *NRDC v. Thomas*, Civ. Nos. 2153-73, 75-012, 75-1698, 75-1267 (D.D.C. Jan. 7, 1987).

9. EPA predicts potential delay due to the lack of any data in the rulemaking record on metals removal at certain chemical plants. *Id.*, Motion to Modify Paragraph 7(b) of Consent Decree.

10. As noted earlier, CMA can bring a district court action to compel EPA to promulgate final sludge rules shortly after the August, 1987 proposal. In addition, Congress or the courts may well force EPA to expedite its current rulemaking schedule. *See* p. 4 and n. 4, 5, and 6, *supra*.

11. CMA speculates, without citation to the record, that removal credits will substantially reduce the industry's compliance costs. CMA Pet. 11. This assumes, contrary to history, that most affected POTWs will both want, and qualify for, credits. It also assumes that the credits will be sufficiently large to

2. Only a small percentage of industrial facilities subject to pretreatment standards have shown any interest in removal credits. The statutory compliance deadline for many of these facilities is already past or soon will be. *See* NRDC Appendix A-8 to A-12. Hence, many seek removal credits not, as CMA suggests, to comply diligently (the date for that is already past), but rather to avoid enforcement for failing to install the same pollution controls as their competitors.[12]

This Court need not invoke its jurisdiction to help Clean Water Act violators escape enforcement. Admittedly, a few facilities may have relied in good faith on removal credits approved prior to the Third Circuit's decision.[13] According to EPA, the forthcoming sludge rules should "alleviate the[ir] principal burdens." EPA Br. 7. Congress may also afford these facilities express relief,[14] but even if Congress does not, they are unlikely

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allow chemical plants to install entirely different, and cheaper, pollution controls than anticipated in the pretreatment standards. There is nothing in the record to support these assumptions. The projected savings from "national" removal credits, CMA Pet. 11, n. 8, refer to rulemaking options which EPA rejected as flatly illegal. *See* 49 Fed. Reg. 31212-31213 (Aug. 3, 1984). They have nothing to do with this case.

12. Many removal credit applications were not filed until less than one year before the industrial compliance deadline. *Cf.* NRDC Appendix A-6 to A-7 *with* NRDC Appendix A-8 to A-12. Credits are then "too late" for an industrial facility which had intended to comply with the deadline because, by then, such a facility would already have purchased its pollution controls. *See* CMA Pet. 12 and n. 9.

13. Categorical pretreatment standards cover roughly 14,000 industrial facilities. EPA had approved credits which comply with all but the sludge requirements of the Clean Water Act for one POTW with only 38 affected facilities. EPA had also approved other credits which violate aspects of the Third Circuit's decision which are unchallenged here. It is unclear whether interest continues in the latter credits, many of which involved facilities with less than a year til their compliance deadline. *See* NRDC Appendix A-1 to A-4 and n. 12, *supra*.

14. Proposed amendments to the Clean Water Act would grant only POTWs with either approved credits or pending credit applications a stay of the sludge requirements of Sections 307(b)(1) and 405(d) of the Act until August 31, 1987, the date by which the bill requires EPA to issue final sludge rules. H.R.1, 100th Cong., 1st Sess. §406(e), 133 Cong. Rec. 211 (1987). See n. 4, *supra*, for a discussion of the status of this legislation.

to suffer. *See , e.g. , General Motors Corp. v. EPA*, 738 F.2d 97, 101 (3d Cir. 1984) (in a closely analogous situation, EPA emphasized that "good faith efforts to achieve compliance will be taken into consideration by the agency in enforcement actions addressed to *specific instances* of noncompliance.")

2. THE THIRD CIRCUIT CORRECTLY DECIDED THAT IT HAD JURISDICTION TO REVIEW THESE RULES.

Below, CMA expressly conceded that the Third Circuit had jurisdiction to review a timely challenge to these rules.[15] Now CMA postulates a directly contradictory theory: that jurisdiction fails because this case allegedly constitutes a challenge to the adequacy of Section 405 sludge regulations. CMA's new-found theory gives rise, in its view, to a conflict between the Third Circuit's decision and general mandates from this and the courts of appeals to stay within statutory bounds on jurisdiction. *See* CMA Pet. 13-16.

EPA disagrees with CMA's new-found theory, as well it should. *See* EPA Br. 7-8. As EPA explains, the issue before the Third Circuit was not whether to compel EPA to promulgate Section 405 sludge regulations. Instead, the Third Circuit had to decide whether Section 307(b) of the Act authorized the pretreatment rules EPA had adopted. Section 509(b)(1)(C) explicitly directs "[r]eview of the Administrator's action . . . in promulgating any . . . pretreatment standard under section 307" exclusively to the courts of appeals. 33 U.S.C. (Supp. II) 1369(b)(1)(C). There can be no question that the Third Circuit properly invoked its jurisdiction.

Both CMA and EPA join in criticizing the timeliness of NRDC's challenge to these rules, though EPA believes that the question turns on the unique facts of this case and is "relatively unimportant." *See* CMA Pet. 16-17 and EPA Br. 8. We agree that the jurisdictional question is tied to unusual facts. However,

15. CMA's Brief to the Third Circuit admitted: "With the exceptions noted in respondent's EPA's brief [i.e., to the timeliness of the case only], *this Court has jurisdiction over this case under §509(b)(1) of the Act*." p. 1 (emphasis added). We discuss CMA's and EPA's objections to timeliness below.

we also believe that the Third Circuit correctly applied the relevant law. Three facts support the Third Circuit's decision.

First, the new rule enabled POTWs to grant more and larger credits, significantly reducing the degree of required pretreatment. CMA App. A-14. This, in turn, forecasted greater sludge contamination, a development sufficient in itself to trigger jurisdiction. *See Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1033 (7th Cir. 1984) ("waiting to see if regulation will really pinch before challenging it in court" is permissible); *Tanner's Council of America, Inc. v. Train*, 540 F.2d 1188, 1196 (4th Cir. 1976) (post-90 day review permissible).

Second, the Third Circuit found that EPA had reproposed for public comment, and then repromulgated, the entire removal credit rule, significantly changing the provisions purporting to implement Section 405 of the Act. CMA App. A-48.

Finally, Section 509(b)(1) of the Act allows challenges based on "grounds which arose after [the] ninetieth day" from promulgation of a rule. 33 U.S.C. (Supp. II) 1369(b)(1). The Third Circuit found: a) EPA had now fallen nine years, rather than one, behind its statutory deadline; b) it was now abundantly clear (as it had not been earlier)[16] that sludge rules were well over a year away from the court's decision; and c) a newly released EPA study and even more recent correspondence from the EPA Administrator to the Chairman of the Senate Oversight Committee documented EPA's failure to issue Section 405 sludge rules. CMA App. A-49 to A-52. These facts afforded the Third Circuit ample bases for jurisdiction.

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16. NRDC could not have raised this issue as to EPA's 1978 rule since, at that time (June 26, 1978), EPA had not yet missed the one-year statutory deadline. When the removal credit rule was reissued in 1981, both EPA and NRDC expected that additional Section 405 regulations would be forthcoming shortly. *See* 46 Fed. Reg. 9404, 9410 (Jan. 28, 1981). NRDC could not then have been charged with knowledge that EPA would completely renege for many more years on its statutory obligation.

3. THE THIRD CIRCUIT CORRECTLY DECIDED THAT THE CLEAN WATER ACT PROHIBITS EPA FROM APPROVING REMOVAL CREDITS IN TOTAL DISREGARD OF SECTION 405 OF THE ACT.

The Third Circuit framed its analysis according to the standard of review articulated in three recent decisions of this Court: *Chemical Manufacturers Ass'n. v. EPA*, 470 U.S. 116 (1985) (interpreting the Clean Water Act); *Chevron, U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984); and *Motor Vehicle Manufacturers' Ass'n. of the United States v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983). The court afforded EPA "the utmost deference," looking only to see that EPA's interpretation of the Clean Water Act was "sufficiently rational" to be upheld. CMA App. A-7 and A-15 to A-19.

Section 307(b)(1) of the Act states plainly: EPA may authorize removal credits only if they do not "prevent sludge use or disposal by such works in accordance with section 405 of this Act." 33 U.S.C. 1317(b)(1). Section 405, in turn, requires EPA *by December, 1978* to publish

> regulations providing guidelines for the disposal of sludge and the utilization of sludge for various purposes. Such regulations shall - (1) identify uses for sludge, including disposal; (2) specify factors to be taken into account in determining the measures and practices applicable to each such use or disposal (including publication of information on costs); (3) identify concentrations of pollutants which interfere with each such use or disposal.

33 U.S.C. 1345(d).

There are five major methods of sludge use or disposal.[17] The statute requires EPA to set concentration limits for each of the 100 or so[18] pollutants found in POTW sludge and for each use

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17. The five major methods are: landfill, incineration, land spread, ocean dumping, and distribution and marketing. CMA App. A-50 and n. 26.

18. CMA App. A-50.

or disposal method. EPA issued Section 405 regulations for only two pollutants and then only for two of the five common disposal methods.[19]

CMA argues that EPA can nonetheless authorize removal credits for any pollutant or disposal method. Under CMA's theory, if regulations issued under other statutes cover a POTW's chosen sludge disposal method (and a few do), those regulations can substitute for Section 405 regulations — without so much as a finding by the agency that the other regulations accomplish the objectives of Section 405. If, as is more likely the case, no federal regulations govern the POTW's disposal of sludge contaminated with a particular pollutant, then, CMA theorizes, EPA can grant removal credits unfettered by any of the constraints on sludge disposal in Sections 307(b)(1) and 405 of the Act. CMA Pet. 18-20.

The Third Circuit correctly found that CMA's theory violated: a) Section 405's explicit directive that EPA issue sludge rules for *each* use or disposal option, b) Section 405's equally explicit directive that EPA issue sludge rules for *each* pollutant of concern in POTW sludge, c) Section 405's statutory deadline for sludge rules by December, 1978, and d) "the congressional goal of making sludge into a productive asset rather than a toxic liability." CMA App. A-10 and A-46 to A-52. In short, the court

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19. *Id*. at A-51 to A-52. CMA claims that EPA has issued sludge rules under both Section 405 and other federal statutes. CMA Pet. 19 and n. 16. This is relatively simple to refute. The Court need only compare the content of the rules mandated by Section 405(d) with those CMA cites. Section 405(d) requires EPA to regulate *each* use or disposal method and all pollutants which interfere with such methods. CMA cannot name a *single pollutant* regulated for *each* disposal method. No regulation indicates what concentrations will prevent beneficial *use* of sludge. CMA App. A-51. And only one of EPA's rules—the limited rule referenced in the text—even purports to be issued under authority of Section 405(d). 40 C.F.R. Part 257.

In any event, the EPA Administrator has twice acknowledged EPA's failure to promulgate the Section 405 rules. CMA App. A-51 to A-52. EPA's own report concedes: "no meaningful sludge criteria" exist. Joint Appendix at 200, 204, *NRDC v. EPA*, 790 F.2d 289 (3d Cir. 1986) (No.84-3530). And EPA has now promised to promulgate the nonexistent Section 405 regulations. EPA Br. 9-10.

held that EPA cannot ignore the plain language of Section 405 and nonetheless purport to act "in accordance with" that section as the Clean Water Act commands.[20]

Although the Third Circuit did not discuss the legislative history,[21] that history confirms the court's Opinion. Congress wanted removal credits, by definition, to reflect pollutant "reduction" or "removal." *1977 Legis. Hist., supra*, at 271, 461 (Conf. Rep. and Sen. Muskie, respectively). Congress decided that pollutants *"are not considered to be removed"* where they contaminate sludge. *Id.* at 690 (S. Rep.) (emphasis added). Without Section 405 rules, EPA has no way of knowing whether pollutants simply move from water to sludge in direct violation of Congress's purpose. *See id.* at 691 (S. Rep.). Hence, EPA cannot say there is any "removal" — or any basis for a credit.

CMA cites Section 405(e) of the Act, 33 U.S.C. 1345(e), which gives POTWs authority to decide how to dispose of sludge provided they comply with any EPA guidelines. CMA reads that section as negating Congress's express directive to EPA, in subsection 405(d), to issue sludge rules by 1978. CMA Pet. 20-22.

Subsection (e) is wholly consistent with the clear and specific language of Section 405(d). Section 405(e), unlike subsection (d), took effect immediately on enactment. It gave POTWs interim authority to dispose of sludge until EPA issued sludge guidelines. It recognized that municipal treatment inevitably

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20. CMA takes issue with the Third Circuit's language indicating that Section 405(d) mandates a "comprehensive framework" of rules. CMA Pet. 18-22. The words "comprehensive framework" are simply a shorthand description of the requirements clearly and specifically set forth in Section 405(d). No regulations exist which meet the requirements of Section 405(d). *See* n. 19, *supra*.

21. EPA criticizes the court's "blanket reliance" on the Senate Report to decide the relationship between Section 307(b) and Section 405. EPA Br. 9. EPA is wrong on two counts. First, the court discusses the Senate Report solely in reference to an entirely different point raised by CACI's petition (i.e., the degree of pollutant removal needed to justify a credit). *See* CMA App. A-31. That discussion is not relevant to Part VI of the Court's Opinion on sludge requirements. Second, contrary to EPA's suggestion, the Conferees did, in fact, adhere to the Senate's concern that pretreatment standards require actual pollution "reduction," not mere shifting of toxics to POTW sludge. *1977 Legis. Hist., supra*, at 271-272 (Conf. Rep.).

produces sludge; POTWs had to dispose of this sludge and could not await EPA guidelines. By contrast, removal credits are not inevitable or mandatory; they exist purely at the discretion of the POTW. 33 U.S.C. 1317(b). But removal credits, if granted, can "not prevent sludge use or disposal . . . in accordance with section 405." *Id*. This is a flat prohibition, unlike Section 405(e). It ensures that removal credits, which are not inevitable, do not compromise sludge use or disposal, which is inevitable. In short, to the extent relevant, Section 405(e) actually supports the Third Circuit's decision.

4. THE THIRD CIRCUIT CORRECTLY DECIDED THAT EPA CANNOT AUTHORIZE REMOVAL CREDITS WHICH DIRECTLY VIOLATE SECTION 307(b)(1) OF THE CLEAN WATER ACT.

While CACI's petition is by no means clear, CACI appears to take issue with the Third Circuit's ruling that removal credits cannot exceed the amount of toxics *consistently*[22] removed by the POTW. CACI asserts that: 1) such matters are more appropriately resolved by a district court, and 2) as a policy matter, compliance with the POTW's NPDES permit[23] should suffice for credits even if it equates to less control than that required of direct dischargers. CACI Pet. 5-9.

CACI's complaints are more appropriately addressed to the Congress than to this Court. Section 509(b)(1)(C) of the Clean Water Act gives the courts of appeals exclusive jurisdiction to review EPA pretreatment standards such as those at issue here. 33 U.S.C. (Supp. II) 1369(b)(1)(C). Likewise, Section 307(b)(1) of the Act specifies that the indirect discharge of pollutants through a POTW must "not violate that effluent limitation or standard

22. CACI uses the term "daily and monthly limits" to refer to what the Third Circuit called "consistency" of pollutant removal. *See* CMA App. A-19 to A-20. For a discussion of the significance of both daily and monthly limits in achieving consistent removal, see CMA App. A-27 to A-32.

23. The Act requires each POTW and direct discharger to have a permit, commonly referred to as the "NPDES" permit. 33 U.S.C. 1311(a) and 1342. Permits for POTWs require secondary treatment. 33 U.S.C. 1311(b)(1)(B).

which would be applicable to such toxic pollutant if it were discharged by [a direct discharger]." 33 U.S.C. 1317(b)(1). This is an additional requirement to the NPDES permit for secondary treatment because secondary treatment "cannot deal adequately with toxic[s]." CMA App. A-7 to A-8 and n. 2.

Since effluent limitations for direct dischargers regulate both the overall amount of toxics discharged as well as the consistency of pollutant removal, Section 307 compels EPA to consider both amount and consistency of pollutant removal in authorizing removal credits. If the Chicago POTW can achieve the pollution reduction it claims, it should have no trouble meeting the consistency requirement. *See* CMA App. A-24, n. 12.[24] But if it cannot, neither the Third Circuit nor this Court can jettison the plain command of the statute in favor of CACI's preferred policy choice. However, EPA may be able to alleviate CACI's concern about the availability of removal credits with more carefully developed regulations. EPA urges this Court to refrain from granting certiorari while the agency attempts to do so. EPA Br. 10-11. We agree.

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24. CACI's real concern appears to be not so much consistency as the measurement and reporting requirements for credits. *Id.* and CACI Pet. 3. The latter, of course, are not at issue here. In addition, Chicago's removal credit application appears to run afoul of the requirement for a combined sewer overflow adjustment. *Cf.* NRDC Appendix A-5 to A-7 *with* CMA App. A-34 to A-42.

CONCLUSION

The petitions for certiorari should be denied. If the Court nonetheless grants any of the petitions, we respectfully urge the Court to specify which of the two principal questions (i.e., sludge or consistent removal requirements) the Court will review.

Respectfully submitted,

Frances Dubrowski
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Defense Council, Inc.
1350 New York Avenue, N.W.
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(202) 783-7800

January 16, 1987

APPENDIX

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

Office of General Counsel

June 25, 1986

Frances Dubrowski, Esq.
Natural Resources Defense Council
1350 New York Avenue, N.W.
Suite 300
Washington, D.C. 20005

Re: *NRDC v. EPA*, 7th Cir. (sic) (No. 84-3530)

Dear Fran:

Enclosed in response to your June 23, 1986 information request is the attached three-page listing of "POTWs with Approved Removal Credits." We believe that this responds fully to your request.

Please note that twelve POTWs have been granted removal credits, while EPA's petition for rehearing incorrectly stated that there were thirteen approvals. We will be filing an errata sheet with the court.

Sincerely,

Dov Weitman
Attorney

Enclosure

cc: All Counsel

POTWS WITH APPROVED REMOVAL CREDITS

1. *Buffalo, NY* — approved 7/19/85; combined sewer system (no CSO calculation).

   Pollutants: cadmium, zinc, chrome, copper, lead, nickel, silver, total metals

   Industry Categories (No. of Facilities):

Electroplating	(20)
Metal Finishing	(15)
Pharmaceutical Mfg.	(4)
Iron & Steel	(4)
Copper Forming	(1)

   Used 1984 regulation to calculate credits.

2. *Monroe County, NY* — approved 9/16/85; operates three plants — #1 is combined sewer system (no CSO calculation) and #s 2 and 3 have separate storm sewers.

   Pollutants: cadmium, chrome, copper, lead, silver, nickel, zinc, total metals.

   Industry Categories (No. of Facilities):

Electroplating/ Metal Finishing	(37)
Coil Coating	(1)
Aluminum Forming	(1)

   Used 1984 regulation to calculate credits.

3. *Memphis, TN* — approved 11/26/84; operates two plants, both have separate storm sewers.

   Pollutants: cadmium, cyanide, lead, chrome, copper, nickel, silver, zinc, arsenic.

   Industry Categories (No. of Facilities):

Electroplating	(9)
Metal Finishing	(5)
Battery Mfg.	(1)
Copper Forming	(1)

   Used 1984 regulation to calculate credits.

4. *Galesburg, IL* — approved 4/9/86; separate storm sewers.
   Pollutants: chrome.
   Industry Categories (No. of Facilities):
   Metal Finishing (1)
   Used 1984 regulation to calculate credits.

5. *Rockford, IL* — approved 5/30/84; separate storm sewers.
   Pollutants: chrome, copper, lead, nickel, zinc, total metals.
   Industry Categories (No. of Facilities):
   Electroplating (12)
   Metal Finishing (26)
   Used 1981 regulation to calculate credits.

6. *Speedway, IN* — approved 6/20/85; combined sewer system (no CSO calculation).
   Pollutants: chrome, zinc.
   Industry Categories (No. of Facilities):
   Metal Finishing (1)
   Used 1984 regulation to calculate credits.

7. *Kenosha, WI* — approved 9/6/85; separate storm sewers.
   Pollutants: lead, zinc, nickel, chrome.
   Industry Categories (No. of Facilities):
   Electroplating (1)
   Metal Finishing (5)
   Copper Forming (1)
   Foundries (2)
   Plastic Molding & Forming (1)
   Used 1984 regulation to calculate credits.

8. *Milwaukee MSD, WI* — approved 8/27/85; combined sewer system (no CSO calculation).
   Pollutants: chrome
   Industry Categories (No. of Facilities):
   Leather Tanning (15)
   Used 1984 regulation to calculate credits.

9. *Racine, WI* — approved 9/26/85; separate storm sewers.
   Pollutants: lead, zinc.
   Industry Categories (No. of Facilities):
   Electroplating (6)
   Metal Finishing (15)
   Used 1984 regulation to calculate credits.

10. *Sheboygan, WI* — approved 6/6/85; separate storm sewers.
    Pollutants: chrome
    Industry Categories (No. of Facilities):
    Electroplating (1)
    Metal Finishing (9)
    Aluminum Forming (2)
    Leather Tanning (2)
    Used 1984 regulation to calculate credits.

11. *Gulf Coast Waste Disposal Authority, TX,* — approved 7/12/85; separate storm sewers.
    Pollutants: oil & grease; ammonia.
    Industry Categories (No. of Facilities):
    Petroleum Refining (2)
    Used 1984 regulation to calculate

12. *Albuquerque, NM* — approved 9/21/85; separate storm sewers.
    Pollutants: cadmium, chrome, copper, lead, nickel, zinc, total metals.
    Industry Categories (No. of Facilities):
    Electroplating/ Metal Finishing (between 25-35)
    Used 1984 regulation to calculate credits.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

Office of General Counsel

December 30, 1986

Frances Dubrowski, Esq.
Natural Resources Defense Council
1350 New York Avenue, N.W.
Suite 300
Washington, DC 20005

Re: *NRDC* v. *EPA*, No. 84-3530

Dear Fran:

This is in response to your August 4, 1986 letter requesting information concerning POTWs which have been granted or have applied for removal credits authority.

A. *POTWs granted removal credits authority*

1. As best as we can determine, there has been no overlap or "doublecounting" of electroplaters and metal finishers.

2. Since pounds of pollutants are not set forth in removal credits applications, EPA does not have information on the number of pounds involved in each removal credit.

3. 22 facilities (21 electroplaters and 1 non-ferrous metals) have removal credits in Albuquerque, N.M. (The original estimate was based upon a review of the permit application. The current information is based upon a recently conducted on-site audit.)

4. The information provided on June 25, 1986 has not changed.

B. *POTWs that have applied for removal credits authority*

The information set forth below is believed to be generally accurate. They may be some minor errors; if any, however, we believe they are minimal. We list below each of 14 POTWs who have applied, and separately answer your questions for each city.

Please note that none of these POTWs performed a CSO adjustment explicitly. (However, some of them do not have combined sewers.)

NAME	DATE OF APPLICATION	POLLUTANTS COVERED	FACILITIES COVERED	COMBINED SEWERS?	REGS USED
Hartland ME	6/28/84	Cr	LT (1)	?	1981
Kanawanda NY	?	Phenol	I&S (1)	?	1984?
Manitowic WIS	2/8/84	Cr, Cu, Pb, Hg, Cn	EP (1) MF (12) Inorg (1) NFM (1)	No	1981
Sauget IL	10/29/85	Cu, Pb, Ni, Zn, Cd, Cr	CF (1) NFM (2)	Yes	1984
Watertown WIS	6/84	Cd, Cr, Cu, Ni, Zn	EP (2) MF (2)	Yes	1981
Middletown OH	1/24/84	Ammonia Phenol	I&S (1)	Yes	1984?
Indianapolis IN	12/85	N, Cr, Cn, Cu, Ni, Pb, Phenol, Zn, O&G, Metals	I&S (1) E&EC (1) PR (3) Timber (3) PE (1) EP/ MF (36)	Yes	1984
Freeport IL	10/7/85	Cu, Zn, Cd, Ni, Cr	MF (1)	No	1984
Fond du Lac WIS	5/31/85	Cr	EP (5) MF (4) LT (1)	?	1984

NAME	DATE OF APPLICATION	POLLUTANTS COVERED	FACILITIES COVERED	COMBINED SEWERS?	REGS USED
S. Milwaukee WIS	8/28/85	Cr	LT (1) MF (4)	?	1984
Grand Haven MI	1/84	Cr	LT (1)	?	1981
Chicago IL	6/28/84	Cr, Cu, Cn, Pb, O&G, Zn, Phenol Metals	EP (142) MF (137) I&S (39)	Yes	1984
Orange County CA	3/84	Cd, Pb, Ni, Zn, Ag	EP (169) MF (76)	No	1981
Stockton CA	1/30/85	Cd, Cr, Cu, Pb, Ni, Zn Ag	EP (?)	No	1984

If you have any further questions, please call.

Sincerely,

Dov Weitman

EFFLUENT GUIDELINES DIVISION
FINAL RULES - PRIMARY CATEGORIES
(1979 - Present)

NATIONAL PRETREATMENT STANDARDS
COMPLIANCE DEADLINES

11/12/85
(Revised)

INDUSTRIAL TECHNOLOGY DIVISION PROMULGATED CATEGORICAL RULES/PSES COMPLIANCE DEADLINES[1]

INDUSTRY	PSES COMPLIANCE DEADLINE
ALUMINUM FORMING	10/24/86
BATTERY MANUFACTURING	03/09/87
COAL MINING	NO KNOWN INDIRECT DISCHARGERS
COIL COATING Phase I	12/01/85
COIL COATING Phase II (Canmaking)	11/17/86
COPPER FORMING	08/15/86
ELECTRICAL/ELECTRONIC COMPONENTS Phase I	07/01/84 A 11/08/85 A
ELECTRICAL/ELECTRONIC COMPONENTS Phase II	07/14/86 B
ELECTROPLATING	04/27/84 C 06/30/84 C 07/15/86 C
INORGANIC CHEMICALS Phase I	08/12/85 D

1. Irrelevant material in original has been omitted here (i.e., 40 C.F.R. Part, date of Administrator's signature of rule, Federal Register citation, effective date of rule).

INDUSTRIAL TECHNOLOGY DIVISION PROMULGATED CATEGORICAL RULES/PSES COMPLIANCE DEADLINES

INDUSTRY	PSES COMPLIANCE DEADLINE
INORGANIC CHEMICALS Phase II	08/22/87 E 06/29/85 E 07/20/80 E
IRON & STEEL MANUFACTURING	07/10/85
LEATHER TANNING & FINISHING	11/25/85
METAL FINISHING	06/30/84 F 07/10/85 F 02/15/86 F
NONFERROUS METALS Phase I	03/09/87
NONFERROUS METALS Phase II	09/20/88
NONFERROUS METALS FORMING	08/23/88
ORE MINING	NO KNOWN INDIRECT DISCHARGERS
PESTICIDES	11/10/88
PETROLEUM REFINING	03/23/80
PHARMACEUTICALS	10/27/86
PLASTICS MOLDING & FORMING	NO CATEGORICAL STANDARDS H
PORCELAIN ENAMELING	11/25/85
PULP & PAPER	07/01/84
STEAM-ELECTRIC POWER PLANTS	07/01/84

INDUSTRIAL TECHNOLOGY DIVISION PROMULGATED CATEGORICAL RULES/PSES COMPLIANCE DEADLINES

INDUSTRY	PSES COMPLIANCE DEADLINE
TEXTILE MILLS	NO CATEGORICAL STANDARDS J
TIMBER	01/26/84 K

KEY:

A. *Electrical/Electronic Components* (Phase I):
July 1, 1984 for TTO (Subparts A & B); November 8, 1985 for Arsenic (Subpart B).

B. *Electrical/Electronic Components* (Phase II):
Compliance date of July 14, 1987 corrected to read July 14, 1986 (Subpart C — to control specific toxic metals, flouride, and TTO).

C. *Electroplating:*
4/27/84 for Metals and Cyanide (nonintegrated plants); 6/30/84 for Metals and Cyanide (integrated plants); 7/15/86 for TTO based on management practices followed by precipitation/clarification).

D. *Inorganic Chemicals* (Phase I):
PSES established only for Subparts F1, AH, AJ, AU.

E. *Inorganic Chemicals* (Phase II):
July 20, 1980 for Subparts A, B, L, AL, AR, BA, and BC; August 22, 1987 for Subparts AJ, AU, BL, M, BN, and BO, except for discharges from copper sulfate or nickel sulfate manufacturing operations;
June 29, 1985 for discharges from copper sulfate or nickel sulfate manufacturing operations and all Subparts in Part 415 not listed above.

F. *Metal Finishing:*

6/30/84 for TTO limit based on management practices only, except for plants covered by Part 420; 7/10/85 for TTO limit based on management practices only for plants covered by Part 420; 2/15/86 for Metals, Cyanide, and TTO based on management practices followed by precipitation/clarification).

G. *Pharmaceuticals:*

The effective date does not apply to provisions which allows (sic) facilities not using or generating cyanide to certify to that effect instead of monitoring for cyanide (Sections 439.14-17, .24-.27, .34-.37, and .44-.47).

H. *Plastics Molding and Forming:*

No categorical standards have been established; all indirect dischargers are required to comply with the General Pretreatment Regulation (40 CFR Part 403).

I. *Pulp and Paper:*

The effective date does not apply to sections that allow facilities not using chlorophenolic biocides or zinc hydrosulfite to certify to that effect instead of monitoring for PCB an (sic) TCP, which are effective May 18, 1983 (48 FR 31403, July 8, 1983; Reporting and Recordkeeping Requirements, OMB Approval, Technical Amendments).

J. *Textile Mills:*

No categorical standards have been established; all indirect dischargers are required to comply with the General Pretreatment Regulation (40 CFR Part 403).

K. *Timber Products Mfg.:*

Compliance established for Subparts F, G, and H only; the regulation reaffirms compliance with the General Pretreatment Regulation (40 CFR Part 403) for all other remaining Subparts.

Supreme Court, U.S.
FILED
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Nos. 86-239 and 86-608

In the Supreme Court of the United States

OCTOBER TERM, 1986

CHEMICAL MANUFACTURERS ASSOCIATION, PETITIONER

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

CHICAGO ASSOCIATION OF COMMERCE AND INDUSTRY, ET AL., PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
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8 pp

In the Supreme Court of the United States

OCTOBER TERM, 1986

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES IN OPPOSITION

This supplemental brief is filed pursuant to Rule 22.6 of the Rules of this Court to notify the Court of a development occurring subsequent to the filing of our brief in opposition that may affect the Court's disposition of the two petitions for a writ of certiorari.

On February 4, 1987, Congress enacted into law, over the President's veto, the Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 *et seq.* Section 406 of that Act amends Section 405(d) of the Clean Water Act, 33 U.S.C. 1345(d), the meaning of which is the subject of the two petitions. In our brief in opposition, we argue that the two petitions should be denied because EPA rulemaking efforts now in progress should eventually alleviate the principal burdens created by the decision. In our view, the new statutory amendments make this Court's review even less appropriate.

Section 406(a) of the Water Quality Act of 1987 amends Section 405(d)(2) of the Clean Water Act to provide that EPA should promulgate sludge rules by August 31, 1987, for certain toxic pollutants and by June 15, 1988, for others. In addition, Section 406(e) of the 1987 Act stays until August 31, 1987, the relevant portion of the decision of the court of appeals in this case with respect to those publicly owned treatment works that either received removal credits prior to February 4, 1987, or that applied for removal credits and whose application was pending on February 4th, and is approved by August 31, 1987. Finally, Section 406(e) provides that "[t]he Administrator shall not authorize any other removal credits under such Act until the Administrator issues the [sludge] regulations required by paragraph (2)(A)

(ii) of section 405(d) of [the Clean Water] Act, as amended."*

Respectfully submitted.

CHARLES FRIED
Solicitor General

FEBRUARY 1987

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* A copy of the pertinent provision of the Water Quality Act of 1987 is appended.

APPENDIX

SEC. 406. SEWAGE SLUDGE.

(a) IDENTIFICATION AND REGULATION OF TOXIC POLLUTANTS.—Section 405(d) is amended—

(1) by inserting "(1) REGULATIONS.—" before "The Administrator, after";

(2) by striking "(1)", "(2)", and "(3)" and inserting in lieu thereof "(A)", "(B)", and "(C)", respectively; and

(3) by adding at the end the following new paragraphs:

"(2) IDENTIFICATION AND REGULATION OF TOXIC POLLUTANTS.—

"(A) ON BASIS OF AVAILABLE INFORMATION.—

"(i) PROPOSED REGULATIONS.—Not later than November 30, 1986, the Administrator shall identify those toxic pollutants which, on the basis of available information on their toxicity, persistence, concentration, mobility, or potential for exposure, may be present in sewage sludge in concentrations which may adversely affect public health or the environment, and propose regulations specifying acceptable management practices for sewage sludge containing each such toxic pollutant and establishing numerical limitations for each such pollutant for each use identified under paragraph (1)(A).

"(ii) FINAL REGULATIONS.—Not later than August 31, 1987, and after op-

portunity for public hearing, the Administrator shall promulgate the regulations required by subparagraph (A)(i).

"(B) OTHERS.—

"(i) PROPOSED REGULATIONS.—Not later than July 31, 1987, the Administrator shall identify those toxic pollutants not identified under subparagraph (A)(i) which may be present in sewage sludge in concentrations which may adversely affect public health or the environment, and propose regulations specifying acceptable management practices for sewage sludge containing each such toxic pollutant and establishing numerical limitations for each pollutant for each such use identified under paragraph (1)(A).

"(ii) FINAL REGULATIONS.—Not later than June 15, 1988, the Administrator shall promulgate the regulations required by subparagraph (B)(i).

"(C) REVIEW.—From time to time, but not less often than every 2 years, the Administrator shall review the regulations promulgated under this paragraph for the purpose of identifying additional toxic pollutants and promulgating regulations for such pollutants consistent with the requirements of this paragraph.

"(D) MINIMUM STANDARDS; COMPLIANCE DATE.—The management practices and numerical criteria established under subpara-

graphs (A), (B), and (C) shall be adequate to protect public health and the environment from any reasonably anticipated adverse effects of each pollutant. Such regulations shall require compliance as expeditiously as practicable but in no case later than 12 months after their publication, unless such regulations require the construction of new pollution control facilities, in which case the regulations shall require compliance as expeditiously as practicable but in no case later than two years from the date of their publication.

"(3) ALTERNATIVE STANDARDS.—For purposes of this subsection, if, in the judgment of the Administrator, it is not feasible to prescribe or enforce a numerical limitation for a pollutant identified under paragraph (2), the Administrator may instead promulgate a design, equipment, management practice, or operational standard, or combination thereof, which in the Administrator's judgment is adequate to protect public health and the environment from any reasonably anticipated adverse effects of such pollutant. In the event the Administrator promulgates a design or equipment standard under this subsection, the Administrator shall include as part of such standard such requirements as will assure the proper operation and maintenance of any such element of design or equipment.

"(4) CONDITIONS ON PERMITS.—Prior to the promulgation of the regulations required by paragraph (2), the Administrator shall impose conditions in permits issued to publicly owned treatment works under section 402 of this Act or take

such other measures as the Administrator deems appropriate to protect public health and the environment from any adverse effects which may occur from toxic pollutants in sewage sludge.

"(5) LIMITATION ON STATUTORY CONSTRUCTION.—Nothing in this section is intended to waive more stringent requirements established by this Act or any other law.".

(b) MANNER OF SLUDGE DISPOSAL.—Section 405 (e) is amended to read as follows:

"(e) MANNER OF SLUDGE DISPOSAL.—The determination of the manner of disposal or use of sludge is a local determination, except that it shall be unlawful for any person to dispose of sludge from a publicly owned treatment works or any other treatment works treating domestic sewage for any use for which regulations have been established pursuant to subsection (d) of this section, except in accordance with such regulations.".

(c) IMPLEMENTATION THROUGH PERMITS.—Section 405 is further amended by adding at the end thereof the following:

"(f) IMPLEMENTATION OF REGULATIONS.—

"(1) THROUGH SECTION 402 PERMITS.—Any permit issued under section 402 of this Act to a publicly owned treatment works or any other treatment works treating domestic sewage shall include requirements for the use and disposal of sludge that implement the regulations established pursuant to subsection (d) of this section, unless such requirements have been included in a permit issued under the appropriate provisions of subtitle C of the Solid Waste Disposal Act,

part C of the Safe Drinking Water Act, the Marine Protection, Research, and Sanctuaries Act of 1972, or the Clean Air Act, or under State permit programs approved by the Administrator, where the Administrator determines that such programs assure compliance with any applicable requirements of this section. Not later than December 15, 1986, the Administrator shall promulgate procedures for approval of State programs pursuant to this paragraph.

"(2) THROUGH OTHER PERMITS.—In the case of a treatment works described in paragraph (1) that is not subject to section 402 of this Act and to which none of the other above listed permit programs nor approved State permit authority apply, the Administrator may issue a permit to such treatment works solely to impose requirements for the use and disposal of sludge that implement the regulations established pursuant to subsection (d) of this section. The Administrator shall include in the permit appropriate requirements to assure compliance with the regulations established pursuant to subsection (d) of this section. The Administrator shall establish procedures for issuing permits pursuant to this paragraph.

"(g) STUDIES AND PROJECTS.—

"(1) GRANT PROGRAM; INFORMATION GATHERING.—The Administrator is authorized to conduct or initiate scientific studies, demonstration projects, and public information and education projects which are designed to promote the safe and beneficial management or use of sewage sludge for such purposes as aiding the restora-

tion of abandoned mine sites, conditioning soil for parks and recreation areas, agricultural and horticultural uses, and other beneficial purposes. For the purposes of carrying out this subsection, the Administrator may make grants to State water pollution control agencies, other public or nonprofit agencies, institutions, organizations, and individuals. In cooperation with other Federal departments and agencies, other public and private agencies, institutions, and organizations, the Administrator is authorized to collect and disseminate information pertaining to the safe and beneficial use of sewage sludge.

"(2) AUTHORIZATION OF APPROPRIATIONS.—For the purposes of carrying out the scientific studies, demonstration projects, and public information and education projects authorized in this section, there is authorized to be appropriated for fiscal years beginning after September 30, 1986, not to exceed $5,000,000."

(d) ENFORCEMENT.—(1) Section 308(a)(4) is amended by inserting "405," before "and 504".

(2) Section 505(f) is amended by striking out "or" before "(6)" and by inserting before the period ". or (7) a regulation under section 405(d) of this Act,".

(3) Section 509(b)(1)(E) is amended by striking out "or 306" and inserting in lieu thereof "306, or 405".

(e) REMOVAL CREDITS.—The part of the decision of Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency, No. 84-3530 (3d. Cir. 1986), which addresses section 405(d) of the Federal Water Pollution Control Act is stayed until August 31, 1987, with respect to—

(1) those publicly owned treatment works the owner or operator of which received authority to revise pretreatment requirements under section 307(b)(1) of such Act before the date of the enactment of this section, and

(2) those publicly owned treatment works the owner or operator of which has submitted an application for authority to revise pretreatment requirements under such section 307(b)(1) which application is pending on such date of enactment and is approved before August 31, 1987.

The Administrator shall not authorize any other removal credits under such Act until the Administrator issues the regulations required by paragraph (2)(A)(ii) of section 405(d) of such Act, as amended by subsection (a) of this section.

(f) CONFORMING AMENDMENTS.—Section 405(d) is further amended—

(1) by inserting "REGULATIONS.—" after "(d)";

(2) by indenting paragraph (1) (as designated by subsection (a)(1) of this section) and aligning such paragraph with paragraph (3), as added by subsection (a)(3); and

(3) in such paragraph (1) by aligning subparagraphs (A), (B), and (C) (as designated by subsection (a)(2) of this section) with subparagraph (C) of paragraph (2), as added by subsection (a)(3) of this section.

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No. 86-239

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHEMICAL MANUFACTURERS ASSOCIATION,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals for the Third Circuit

SUPPLEMENTAL BRIEF OF PETITIONER CHEMICAL MANUFACTURERS ASSOCIATION

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February 1987

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-239

CHEMICAL MANUFACTURERS ASSOCIATION,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

SUPPLEMENTAL BRIEF OF PETITIONER CHEMICAL MANUFACTURERS ASSOCIATION

Pursuant to Rule 22.6, petitioner Chemical Manufacturers Association requests that this Court grant *certiorari*, vacate or stay the decision below, and remand this case for further proceedings in light of the amendments to the Clean Water Act enacted on February 4, 1987.[1]

Section 406(e) of these amendments overrules the decision below. It expressly stays the decision below and authorizes removal credits previously approved and submitted for approval before February 4, 1987. The amendments also authorize the granting of ad-

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[1] Water Quality Act of 1987, Section 406, Public Law 100-4, 101 Stat. 7. A copy of these amendments has just been filed with the Court by respondent Environmental Protection Agency.

ditional credits upon promulgation of sludge regulations by August 1987 under § 405 of the Act.

The recent amendments are at odds with the decision below and were intended to resolve the problems created by that decision. The appropriate course of action is to grant *certiorari*, vacate or stay the decision below, and remand the case for further proceedings consistent with the new amendments.[2]

Respectfully submitted,

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February 1987

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[2] *See* United States v. Provenzano, 469 U.S. 14 (1984); Stern and Gressman, *Supreme Court Practice*, 6th ed., § 5.13 (1986).

Supreme Court, U.S.
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JAN 14 1987
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(3) (5)

Nos. 86-239 & 86-608

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHEMICAL MANUFACTURERS ASSOCIATION,
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Respondents.

CHICAGO ASSOCIATION OF COMMERCE AND INDUSTRY, *et al.*,
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v.
NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF AMICUS CURIAE OF THE MUNICIPAL PRETREATMENT GROUP IN SUPPORT OF THE PETITIONS FOR CERTIORARI

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IN THE

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On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF AMICUS CURIAE OF THE MUNICIPAL PRETREATMENT GROUP IN SUPPORT OF THE PETITIONS FOR CERTIORARI

The City of Albuquerque, Buffalo Sewer Authority, Metropolitan Sanitary District of Greater Chicago, Gulf Coast Waste Disposal Authority (Texas), City of Indianapolis, City of Memphis, Milwaukee Metropolitan Sewerage District, and Sanitary District of Rockford, Illinois (hereinafter "The Municipal Pretreatment Group") file this brief, *amicus curiae* in support of the petitions for certiorari filed in this case. All parties of record have given their consent to this filing.

STATEMENT OF INTEREST OF THE MUNICIPAL PRETREATMENT GROUP

The Municipal Pretreatment Group has a substantial interest in the outcome of this case. The Municipal Pretreatment Group is an unincorporated coalition of municipalities and special purpose sewerage districts, all of which own and operate publicly owned waste water treatment works ("POTW"s). These municipal authorities either have approved "removal credit" programs under Section 307(b) of the Clean Water Act, 33 U.S.C. § 1317(b) (1982), or have programs under development and in some cases awaiting only final agency approval. Its members, along with other interested cities, constitute the Conference on Removal Credits of the Association of Metropolitan Sewerage Agencies ("AMSA"), a national non-profit association of 100 municipal agencies and special purpose districts which own and operate nearly all of the nation's large POTWs serving a combined population of over 80 million people.

AMSA was a petitioner in the Third Circuit's earlier review of "removal credits", which resulted in a decision upholding the United States Environmental Protection Agency's (EPA) removal credit regulation. *National Association of Metal Finishers v. U.S. Environmental Protection Agency*, 719 F.2d 624 (3rd Cir. 1983) *rev'd in part, sub nom. Chemical Manufacturers Association v. National Resources Defense Council, Inc.*, 470 U.S. 116 (1985).

The Municipal Pretreatment Group filed a motion for late intervention with the Third Circuit in the instant case after the decision was issued but before the denial of rehearing. That motion was denied.

Under Section 307(b) of the Clean Water Act, EPA promulgates categorical pretreatment standards for industrial discharges to POTWs. Congress authorized POTWs to grant "removal credits" to industrial dis-

chargers where pretreatment by industry and subsequent treatment at the POTW would result in duplicative treatment. Removal credits therefore modify categorical pretreatment standards promulgated by the EPA. These credits have become an integral part of the pretreatment programs, either in place or under development, in many industrial communities throughout the country.

The decision of the Third Circuit struck down EPA's removal credit regulations on, *inter alia*, the grounds that EPA has not promulgated sufficiently comprehensive regulations governing the use or disposal of municipal sewage sludge under Section 405 of the Act, 33 U.S.C. § 1345.

The decision below would invalidate all EPA approved pretreatment programs which include removal credits. The decision would also indefinitely suspend the authority of POTWs to grant removal credits in the future. The effect of the decision, if permitted to stand, would be to disrupt years of planning, negotiations, and commitment of resources by POTWs in the development of effective local pretreatment programs.[1]

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW RAISES ISSUES OF NATIONAL IMPORTANCE

The decision of the Third Circuit, if allowed to stand, would invalidate EPA's removal credit regulations and thereby dismantle for an indefinite period an essential element of the Clean Water Act's pretreatment program. As a result of that decision, POTWs such as members of the Municipal Pretreatment Group are threatened with substantial and serious disruption of their pretreatment programs.

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[1] Other aspects of the decision find EPA's removal credit program deficient for reasons unrelated to § 405 and could be cured by EPA without necessarily invalidating existing removal credits, or unduly disrupting local pretreatment programs.

These public agencies have developed local pretreatment programs as required by Section 402(b)(8) of the Clean Water Act, 33 U.S.C. § 1342(b)(8). As an integral part of these pretreatment programs, they have applied for and received approval (or have applications under development and pending approval) under 40 C.F.R. § 403.7 to grant "removal credits" to industrial concerns which discharge treated waste water effluent into their POTW systems ("indirect dischargers"). Where already granted, approval for such credits is reflected in NPDES discharge permits issued under Section 402 of the Act, 33 U.S.C. § 1342.

These agencies have invested considerable public resources in the development of pretreatment programs tailored to the particular facts and circumstances of the communities they serve. These investments include sampling, monitoring and reporting with respect to POTW removal capabilities, indirect dischargers' pretreatment systems, receiving water quality and sewage sludge characteristics; developing necessary local industrial waste ordinances; building staff and laboratory capacity for the implementation of the local pretreatment effort; cooperation and negotiation with industrial dischargers; application to and review by state permitting authorities and EPA; and involvement of the public through comment and hearing procedures.[2]

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[2] The experience of the Sanitary District of Rockford, Illinois is illustrative. The District is a unit of local government under the Illinois Constitution and is established pursuant to statutory authority independent of other municipal governments. It first submitted an application for removal credits in draft form to EPA in 1980 based upon its monitoring of influent and effluent data over the previous year. Meanwhile, in preparation for submitting a final application, the District staff substantially revised its local pretreatment ordinance and obtained approval of its Board of Trustees for such changes. This was accomplished in late 1982. Because of ongoing changes in EPA regulations and surrounding uncertainty it was not until September 2, 1983 that the

To the extent that removal credit authority is an integral component of an agency's pretreatment strategy, the Third Circuit's decision in this case effectively destroys these investments of time, money and public credibility made over many years.

The Municipal Pretreatment Group will be particularly affected by that aspect of the decision which, read literally, precludes *any* removal credit program until EPA issues comprehensive sludge management regulations under Section 405(d) of the Act, 33 U.S.C. § 1345(d). With this one stroke of the pen, the Court has invalidated elements of local ordinances, industry/POTW contracts, pretreatment program approvals, and NPDES permits.

Many POTWs have relied upon the participation of ratepaying industrial indirect dischargers. Without the authority to grant removal credits, when appropriate, local industries which, under the decision below, would now be required to meet categorical pretreatment standards may see little advantage to discharging into POTWs and may elect to become direct dischargers. More significant than the loss of revenue to municipal agencies, would be the undesirable consequences of industrial firms becoming direct dischargers rather than being a part of regional systems with better monitoring and control features, one of the principal goals of the Clean Water Act.

District submitted a final application to EPA based upon more recent data and monitoring. The development and submittal of the application for removal credits, extending as it did over a number of years involved extensive staff and management time and a major diversion of scarce resources.

That application was not approved until May 30, 1984 and it was not until January of 1986 that removal credits were incorporated into the District's NPDES permit—approximately six years after the first application was submitted in draft form. As finally approved, the program permits the District to grant removal credits for copper, zinc, chromium, nickel, and lead to 39 separate local metal plating and metal finishing industries. All of these metals are subject to State regulations which limit land application of sludge.

If such industries become direct dischargers, the enforcement and monitoring responsibilities for their effluent would be transferred to the state and Federal environmental protection agencies, thereby increasing the burden on those agencies which may lack the staff and the funding to handle such an increase in work load.

Another potential consequence of the decision below is industry closure. If POTWs are not able to grant removal credits many local industries, particularly those with aging physical plants, may decide to abandon these facilities rather than make the substantial capital improvements necessary to comply with categorical pretreatment standards. If this occurs, the loss of jobs and the erosion of the economic and tax base in these communities will be significant.

II. THE DECISION BELOW UPSETS EPA'S LONG-STANDING INTERPRETATION OF THE CLEAN WATER ACT RELIED UPON BY POTWs.

Prior to the decision below, EPA has interpreted Section 307(b) of the Act to permit local removal credit programs as long as the POTW's chosen method of sludge use or disposal was in compliance with any applicable federal, state or local sludge requirements. (*See*, Federal Respondent's Brief, p. 4). This interpretation is reasonable and consistent with the language of the statute, and permitted the effectuation of the removal credits concept by interested POTWs. The Municipal Pretreatment Group relied on this interpretation in the development of local programs, just as industries relied on local removal credits in planning for their compliance with categorical pretreatment standards.

The decision of the Third Circuit now makes the issuance of additional sludge management guidelines under Section 405(d) a pre-condition for the issuance of removal credits under Section 307(b), effectively rendering that portion of Section 307 a nullity in the interim,

a result Congress could not have intended. The Clean Water Act, through express language makes the removal credit program discretionary with local POTWs under Section 307(b)(1). Yet the Third Circuit's decision removes that discretion entirely despite the fact that, again through express language, the Act makes determinations with respect to sludge disposal or use a matter of local discretion under Section 405(e), 33 U.S.C. § 1345(e), and regardless of the POTW's compliance with all local, state and Federal requirements currently applicable to sludge management practices.

Nothing in the express language of either Section 307(b) or Section 405(d) requires promulgation of sludge regulations for all pollutants and all use or disposal options before any removal credit programs can be implemented. Congress anticipated that the Federal sludge guidelines would evolve over time, and expressly provided not just for initial rulemaking by a date certain, but also for additional promulgations "from time to time thereafter". 33 U.S.C. § 405(d). Had Congress intended to delay the removal credit program until all Section 405(d) rulemakings had been completed, it could easily have provided some explicit trigger mechanism in Section 307(b), or elsewhere in the Act. It did not.

Furthermore, by tying the removal credit authority in Section 307(b) to only federally promulgated sludge regulations under Section 405(d), the Third Circuit has failed to give proper effect to Congress' intent that, in the absence of a Section 405(d) guideline, "the manner of disposal or use of sludge is a local determination". 33 U.S.C. § 405(e).

Section 510 of the Act, 33 U.S.C. § 1370 expressly provides that nothing in the Act shall prohibit states from adopting and enforcing pollution abatement measures provided that the state standards are not less stringent than standards promulgated under the Act. In this case, where there are no federally promulgated sludge stand-

ards that are more stringent, the Act clearly states that state or local laws and regulations shall prevail.[3]

It is entirely possible that existing limitations on sludge disposal in some states will be more stringent than some future EPA promulgated regulations under Section 405 (d). In such a case it is the stricter state regulations already in existence which will govern. The Third Circuit's decision essentially ignores these state and local limitations and the important role they play and may continue to play in the future in protecting the public health.

A particularly burdensome aspect of the decision below is that it leaves both public agencies and indirect dischargers in a legal "no man's land" of sudden noncompliance. Both have relied in good faith on the availability of removal credits. Now, for some indefinite future until Section 405(d) sludge regulations are promulgated, both are potentially subject to enforcement proceedings. Industrial dischargers that completed capital equipment programs in reliance on credits may be immediately out of compliance with categorical pretreatment standards. POTWs, no longer able to grant credits, will be obligated under the terms of their pretreatment program approvals to enforce the categorical standards against industry, or risk enforcement themselves from EPA, state agencies and citizen suits. These significant new enforcement obligations will require increased commitments of resources and personnel. POTWs will have to put local industries on compliance schedules, monitor that compliance, and prosecute those who cannot comply.

The government's opposition to certiorari essentially ignores this aspect of the case. While maintaining that

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[3] For example, the state of Illinois has regulations in place which limit the land application of sludge containing any of the metals for which the Sanitary District of Rockford has authority to grant removal credits. Similarly, the City of Racine, Wisconsin was granted authority to issue removal credits for chromium, zinc and lead, all of which are subject to state sludge regulations.

the Third Circuit's decision is erroneous, and recognizing the hardship it will impose on the regulated community (*See*, Federal Respondent's, Brief, pp. 7, 9-10), the government nonetheless argues against further review on the ground that further "rulemaking efforts now in progress should eventually alleviate the principal burdens created by the decision." (*Id.*, p. 7). EPA's efforts to promulgate sludge regulation under Section 405(d) have already been "in progress" for many years. Proposed rules are expected no earlier than August of 1987. Final rules will undoubtedly require an additional six months to a year to be promulgated if EPA's experience on major regulations is a reliable indicator. Moreover, the odds are great that the final regulations will be challenged judicially, adding another year or two to the process. Thus, for an indefinite and lengthy period, the POTWs and industries effected by the decision below remain at risk of civil and even criminal enforcement proceedings. EPA may eventually alleviate this burden prospectively, but it has done nothing, and offers nothing in its Opposition, to remedy the immediate dilemma faced by both POTWs and their indirect industrial dischargers.

CONCLUSION

The decision below raises issues of national significance. If that decision stands, the removal credit portion of the pretreatment program will be indefinitely suspended and POTWs throughout the country will be faced with the burden of substantially altering their local pretreatment programs. In addition, the significant time and resources POTWs have already committed to the development of programs in compliance with EPA's 1984 regulations will have been largely for naught.

The Third Circuit's decision is also contrary to EPA's reasonable and longstanding interpretation of the Act—an interpretation relied upon by municipalities and industry in the development of effective industrial pretreatment programs.

For all of the foregoing reasons, the Municipal Pretreatment Group urges the Court to grant the petitions for a writ of certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHEMICAL MANUFACTURERS ASSOCIATION,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

BRIEF OF AMICUS CURIAE LEATHER INDUSTRIES OF AMERICA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

The questions presented are:

1. Whether the Court of Appeals lacked jurisdiction under section 509(b)(1) of the Clean Water Act to review the adequacy of sludge management regulations under section 405 of the Clean Water Act.
2. Whether the underlying action challenging EPA's removal credit regulations based upon the absence of comprehensive sludge management regulations under section 405 was timely.
3. Whether EPA may allow removal credits under section 307(b)(1) without first promulgating comprehensive sludge management regulations under section 405.

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BRIEF OF AMICUS CURIAE LEATHER INDUSTRIES OF AMERICA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INTRODUCTION AND STATEMENT OF INTERESTS

Leather Industries of America ("LIA") respectfully submits this brief as *amicus curiae* in support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit (hereinafter cited as "CMA Pet.") filed by the Chemical Manufacturers Association ("CMA") on August 16, 1986.

LIA, formerly the Tanners' Council of America, is one of the oldest trade associations in America. Its members are tanners of leather and manufacturers of leather goods, and it represents the substantial majority of leather tanners and finishers in the United

States. Many of LIA's member companies are indirect dischargers for whom categorical pretreatment standards promulgated by the Environmental Protection Agency ("EPA") on November 23, 1982, went into effect on November 23, 1985. *See* 47 Fed. Reg. 52,848.

In reliance upon EPA's removal credit regulations promulgated in 1978 and amended in 1981 and 1984, many of these companies have applied for or received removal credits from Publicly Owned Treatment Works ("POTWs") into which they discharge. These removal credits have allowed LIA member companies to avoid the unnecessary expense of construction and operating pretreatment technology which merely duplicates the treatment of the POTW.

The opinion of the Court of Appeals for the Third Circuit ("Court of Appeals" or "Third Circuit") invalidates the EPA regulatory program under which these removal credits were issued and therefore voids the credits upon which the companies have reasonably relied. Upon issuance of the Court of Appeals mandate, those companies will be in violation of the Clean Water Act and subject to potential civil penalties. Because its members have a direct stake in the outcome of this proceeding, LIA hereby files its brief in support of the petition for writ of certiorari filed by the CMA.[1]

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[1] LIA also supports the Petition filed by the Chicago Association of Commerce and Industry, et al., No. 86-608. That petition urges review of the Third Circuit's ruling on certain technical deficiencies of the regulations as well as the absence of sludge regulations. The focus of this brief, however, is upon the perceived jurisdictional inadequacy of that portion of the Third Circuit's ruling which invalidated the 1984 pretreatment regulations pertaining to removal credits on grounds that EPA's

EPA acknowledges that industries have reasonably relied upon removal credits. EPA Brief in Opposition at 9 (hereinafter cited as "EPA Br. Opp."). EPA also agrees that invalidation of those credits by the Court of Appeals on the erroneous ground that EPA's sludge regulations are inadequate is incorrect. *Id.* However, EPA has declined to urge review of the decision below because it believes that the harm will be cured by promulgation of EPA's sludge regulations.

EPA's sludge management regulations were already overdue when the first removal credits regulations were promulgated in 1978. Since that time, EPA has consistently promised that its regulations are "close to proposal." *See* CMA Pet. at A-49. In its Brief in Opposition, EPA again acknowledges that the rulemaking schedule has been delayed. EPA Br. Opp. at 10. Even if EPA adheres to its newly proposed schedule, LIA members will face irreparable harm as a consequence of the opinion of the Court of Appeals invalidating removal credits. Loss of removal credits will force companies to spend thousands of dollars individually to construct treatment equipment which will become unnecessary when removal credits are reissued. It is facile at best for EPA to claim that this ruling by the Court of Appeals invalidating removal credits based upon the absence of section 405 regulations and subjecting companies to potential irreparable harm is not worthy of correction by this Court.

LIA believes that review by this Court is essential to correct the errors in the opinion below and to avoid

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underlying sludge management regulations under section 405 (33 U.S.C. § 1345) (hereinafter referred to as "section 405") are inadequate.

the adverse effects which improper revocation of removal credits would have upon LIA members. This case raises significant issues of the jurisdiction of the courts to oversee an agency's administration of the law. Settled administrative decisions upon which regulated parties have extensively relied should not be subject to constant and continuing review by the courts. The Clean Water Act explicitly so provides by limiting the cases which may be heard directly by courts of appeals and by requiring such suits to be brought within 90 days. *See* 33 U.S.C. § 1369(b)(1)(1982).

STATEMENT OF THE CASE AND SUMMARY OF THE ARGUMENT

LIA members, together with municipalities, have invested substantial resources in compliance with the pretreatment regulations promulgated by EPA under the Clean Water Act. As intended by Congress, those investments have served to protect and conserve the Nation's water supplies. As part of this regulatory scheme, LIA members, and others, have been able to avoid investment in certain technologies and equipment that merely duplicates the wastewater treatment of POTWs. The substantial investment decisions necessitated by EPA's pretreatment regulations must be made well in advance of compliance deadlines in order to avoid costly civil penalties.

If EPA's pretreatment regulations are to require important investment decisions on the part of industry and government, it is essential to fairness that those making the investment decisions be entitled to rely on the finality of the rulemaking on which those decisions are based. In this case, Respondent Natural Resources Defense Council's ("NRDC's") challenge to

EPA's rulemaking was untimely and should be jurisdictionally barred. NRDC initiated its challenge to the rulemaking several years after promulgation of the standard, in clear contravention of the Clean Water Act's requirements that such challenges be initiated within 90 days of promulgation. *See* 33 U.S.C. § 1369(b)(1) (1982). Because NRDC failed to initiate this action in a timely fashion, its lawsuit should have been dismissed by the Court of Appeals. In addition, the Court of Appeals lacked original jurisdiction to address the validity of EPA's sludge management regulations.

Finally, the Court of Appeals erred by invalidating the pretreatment removal credits provisions of the standard because EPA had not promulgated a "comprehensive framework" of sludge disposal regulations. We agree with the CMA that neither the statute nor its legislative history provides any requirement for prior issuance of sludge disposal regulations. Rather, the statute merely, but explicitly, provides that removal credits can be approved so long as the resulting discharge "does not prevent" the POTW from complying with sludge use or disposal practices in accordance with section 405 of the Clean Water Act. 33 U.S.C. § 1317(b)(1)(1982). The conclusion of the Third Circuit Court below that this language presupposes the comprehensive and final issuance of sludge disposal regulations is totally unsupportable and should be vacated.

REASON FOR GRANTING THE WRIT

The Writ Should Issue To Avoid Conflicts With Decisions Of This Court And Other Courts Of Appeals Regarding Original Appellate Court Jurisdiction Under The Clean Water Act

I. The Third Circuit Exceeded Jurisdiction Limitations Required by the Clean Water Act and Accepted By Other Courts of Appeals in Holding EPA's Removal Credit Regulation Invalid Because of the Absence of Sludge Management Regulations

Courts of appeals are courts of limited jurisdiction. *See Bender v. Williamsport Area School Dist.*, 106 S.Ct. 1326, 1331 (1986). In cases challenging Agency action under the Clean Water Act, original court of appeals jurisdiction is available only for certain limited categories of cases. *See* 33 U.S.C. § 1369(b)(1) (1982). In addition, challenges under section 509 must be brought within ninety days of promulgation of the challenged action. *Id.* In this case, the challenge to removal credits based upon the absence of adequate sludge management regulations under section 405 violates both of these jurisdictional precepts.

A. The Court of Appeals lacked original jurisdiction to review the validity of EPA's regulation of sludge management and disposal

Section 509(b)(1) of the Clean Water Act provides for original court of appeals jurisdiction only over limited EPA actions.[2] These are Agency actions un-

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[2] Section 509(b)(1) reads: "Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard un-

dertaken upon well-developed administrative records, for which direct review by courts of appeals is particularly appropriate. *See E.I. duPont de Nemours & Company v. Train*, 430 U.S. 112 (1977). Other circuit courts have held that Agency actions not falling within the scope of these specifically enumerated categories of section 509(b)(1) are not reviewable by courts of appeals. *City of Baton Rouge v. EPA*, 620 F.2d 478, 480 (5th Cir. 1980); *Bethlehem Steel Co. v. EPA*, 538 F.2d 513, 518 (2d Cir. 1976). Review of section 405 regulations is not among the enumerated categories of action subject to direct review by courts of appeals.[3]

In this case, the Third Circuit directly reviewed the adequacy of EPA's section 405 sludge management regulations. It held that EPA's existing sludge regulations are inadequate because they "do nothing to advance the congressional goal of making sludge into a productive asset rather than a toxic liability." *NRDC v. Thomas*, 790 F.2d 289, 314 (3d Cir. 1986). The Court of Appeals also ruled that EPA could not rely

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der section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, or 1316 of this title, and (F) in issuing or denying any permit under section 1342 of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal Judicial District in which such person resides or transacts such business upon application by such person." 33 U.S.C. § 1369(b)(1) (1982).

[3] Under section 505 of the Clean Water Act, district courts are granted express jurisdiction to review actions predicated upon the performance of certain non-discretionary duties. 33 U.S.C. § 1365(a) (1982). General jurisdiction for district court review also exists under 28 U.S.C. § 1331 (1982).

upon regulations promulgated under other environmental statutes, despite the fact that such regulations establish sludge management restrictions, albeit not under section 405. *Id.* In so holding, the Court of Appeals had before it no administrative record supporting either the existing section 405 regulations or the scope and applicability of other regulations affecting sludge disposal.[4]

Although the Court of Appeals may have had direct jurisdiction pursuant to section 509 to review removal credit regulations promulgated under section 307, the Court of Appeals clearly lacked jurisdiction to review the adequacy of section 405 regulations. Section 307 only requires that removal credits not prevent "sludge use or disposal by such works in accordance with [section 405 of this Act]." 33 U.S.C. § 1317(b)(1)(1982). This provision does not afford the Court of Appeals jurisdiction to review the validity of existing section 405 regulations. Rather, it only affords the court authority to compare removal credit regulations under section 307 with existing section 405 regulations to assure that removal credits do not "prevent" compliance with promulgated sludge management requirements.

B. The Court of Appeals lacked jurisdiction because NRDC's time to challenge the removal credits based upon the absence of section 405 regulations had expired.

Section 509(b) of the Clean Water Act provides that a regulation otherwise subject to review in the court

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[4] LIA also joins CMA's argument that the ruling of the Third Circuit failed to accord sufficient deference to a reasonable Agency interpretation of its own regulations. CMA Pet. at 17-21.

of appeals may only be challenged by a Petition for Review filed within ninety (90) days of promulgation unless the challenge is based solely on grounds which arose after the ninety day period expired. 33 U.S.C. § 1369(b)(1). This time limit is jurisdictional and is premised upon the same important policy considerations which underlie other filing and timeliness limitations, namely administrative repose. *See NRDC v. EPA*, 673 F.2d 400, 406 (D.C. Cir.), *cert. denied*, 459 U.S. 879 (1982); *Homestake Mining Co. v. EPA*, 584 F.2d 862, 863 (8th Cir. 1978). *See also Texas v. ICC*, 749 F.2d 1144, 1146 (5th Cir.), *cert. denied*, 105 S. Ct. 3513 (1985) (enforcing similar sixty (60) day review provision for Interstate Commerce Commission rulings); *Eagle-Picher Industries, Inc. v. EPA*, 759 F.2d 905, 911 (D. C. Cir. 1985) (construing ninety (90) day review provision of the Comprehensive Environmental Response Compensation and Liability Act); *City of Seabrook v. EPA*, 659 F.2d 1349, 1370 (5th Cir. 1981), *cert. denied*, 459 U.S. 822 (1982) (strictly enforcing similar sixty (60) day judicial review provision in Clean Air Act). Parties must be able to rely upon the finality of Agency rulemaking since important investment decisions must be made well in advance of compliance dates to avoid substantial civil penalties. Moreover, these time limitations impart finality to the administrative process, thus conserving administrative resources. *Texas Municipal Power Agency v. EPA*, 799 F.2d 173, 175 (5th Cir. 1986); *NRDC v. NRC*, 666 F.2d 595, 602 (D. C. Cir. 1981). Regulatory provisions which remain unchallenged during the ninety day period must not be subject to future challenge absent a showing of significant new facts or circumstances. *Eagle-Picher Industries*, 759

F.2d at 911; *Investment Company Institute v. Board of Governors*, 551 F.2d 1270, 1280 (D.C. Cir. 1977).

1. NRDC's Challenge Was Not Brought Within 90 Days.

For the leather tanners, decisions regarding the installation of water pollution control technology ripened in November of 1982 when EPA promulgated effluent guidelines for the industrial category, including pretreatment standards for existing sources ("PSES") and pretreatment standards for new sources ("PSNS") for indirect dischargers. In effect at that time, although under challenge as too stringent, were EPA's 1981 removal credit regulations. Those regulations, including provisions allowing for the approval of removal credits prior to promulgation of comprehensive sludge management regulations under section 405 of the Clean Water Act, were upheld by the Court of Appeals for the Third Circuit without a challenge by NRDC to the absence of section 405 regulations. NRDC was a party to that litigation. *National Association of Metal Finishers v. EPA*, 719 F.2d 624, 646 (3d Cir. 1983), *rev'd in part sub nom. Chemical Manufacturers Association v. NRDC*, 470 U.S. 116 (1985).

When NRDC raised its challenge in 1984, EPA's rulemaking on the relationship between removal credits and section 405 regulations was already well settled. In fact, the relationship between removal credits issued under section 307(b)(1) and sludge use guidelines issued under section 405 of the Clean Water Act has remained virtually intact since 1978. Neither the 1981 nor the 1978 regulations required development of final comprehensive sludge management regula-

tions under section 405 as a precondition for program authorization for removal credits by POTW.

In its preamble to the 1978 regulations EPA announced:

> Where Section 405 criteria are not yet available, applicable EPA and State guidance will be used and the municipal NPDES permit will condition continuation of the allowances for POTW removal upon compliance with Section 405 criteria whenever it is published.

43 Fed. Reg. 27,736, 27,765 (June 26, 1978). The applicable EPA and State guidance to be used pending publication of section 405 regulations included regulations issued under the authority of the Clean Air Act, the Toxic Substances Control Act ("TSCA"), existing ocean dumping regulations, subtitle C of the Solid Waste Disposal Act, and State criteria. Clearly, the parties were on notice in 1978 that EPA did not consider comprehensive regulations under section 405 of the Clean Water Act as a condition precedent to the issuance of valid removal credits. NRDC did not challenge this interpretation.

In its 1981 regulations, EPA repeated its view that while approval of removal credits by a POTW requires compliance by the POTW with applicable State and Federal sludge management requirements, authorization to grant removal credits does not require prior promulgation of special rules embracing all such standards under section 405 of the Clean Water Act:

> [T]he POTW first determines the manner in which it will dispose of its sludge, then it identifies and complies with the appropriate Federal regulations or guidelines pertaining

> to that method of disposal. Section 403.7 provides that the POTW will not be able to receive removal allowance approval [Section 403.7(b)(4)] or maintain an approved level of removal [Section 403.7(f)(2)] if it fails to comply with Federal, State or local requirements applicable to its selected method of sludge disposal.

46 Fed. Reg. 9404, 9427 (January 28, 1981). Again, EPA suggested that such approval could be based upon a variety of applicable Federal regulations or guidelines relating to sewage sludge disposal, including the Clean Air Act, TSCA, and the Resource Conservation and Recovery Act, as well as the Clean Water Act. *Id.* at 9428. No requirement for comprehensive section 405 regulations was set forth.

Thus, the grounds which the Court of Appeals asserts as its basis for overturning EPA's 1984 regulations were clearly enunciated not once but twice prior to 1984. EPA's reliance upon this "patchwork" of regulatory authority rather than comprehensive section 405 regulations was manifest in both 1978 and 1981. Interested parties, including NRDC, had the opportunity to challenge this interpretation not once but twice and failed to do so.

This portion of the regulations which is virtually unchanged from previous rules should not be considered "fair game" for attack long after critical investment decisions have been implemented. Otherwise, EPA could never adjust, fine-tune or amend regulations without subjecting its entire rule to endless review. *Pacific Legal Foundation v. Costle*, 586 F.2d 650, 655 (9th Cir. 1978), *rev'd on other grounds*, 445 U.S. 198 (1980) (modification of existing permit af-

fects only the meaning and scope of those provisions and does not afford a basis for judicial review of all provisions of the permit). Companies which have reasonably relied upon the finality of such regulations should not later be forced to bear unnecessary burdens, including additional compliance costs and the threats of civil penalties, when such regulations are belatedly attacked.

2. No new grounds have arisen to allow review.

The Third Circuit held that NRDC's claim is based upon "grounds" which arose after the 90th day following promulgation of earlier removal credit rules. *NRDC v. Thomas*, 790 F.2d at 312-13. These "grounds" actually consist only of EPA's continuing failure to promulgate section 405 regulations. However, as the Court of Appeals acknowledges, the section 405 regulations which it finds critical to approval of any removal credits were already overdue in 1978 and in 1981 when prior versions of the regulations were promulgated. *Id.* Nothing but the passage of time and the subjective expectations of NRDC have changed since then. Neither of these considerations can justify an extension of a jurisdictional filing requirement.

New "grounds" ordinarily must include events which "occur or information [which] becomes available after the statutory review period expires that essentially create a challenge *that did not previously exist.*" *Eagle-Picher Industries*, 759 F.2d at 913 (emphasis added); *Geller v. FCC*, 610 F.2d 973, 977-78 (D.C. Cir. 1979). Here the grounds for NRDC's challenge existed in 1978 and 1981. Accordingly, NRDC's challenge to the 1984 rules is time barred, and the Court of Appeals lacked jurisdiction to hear that claim. This

requirement is intended to ensure finality of administrative decisions upon which regulated parties must make financial and other business actions. The repose of established regulations is central to the fairness of our administrative process. The Third Circuit's ruling in this case, in contravention of this well-established rule, has caused imminent irreparable harm to LIA members. This harm can only be prevented by the granting of the petition.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit filed by the Chemical Manufacturers Association should be granted.

Respectfully submitted,

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